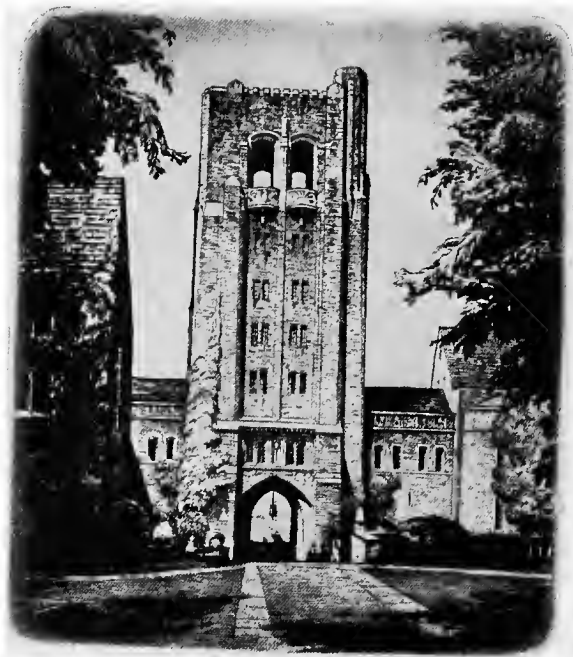


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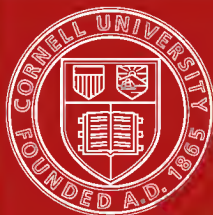
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A TREATISE
ON THE
PRACTICE IN PROBATE COURTS
IN THE
PROBATE OF WILLS AND SETTLEMENT OF
ESTATES,
IN THE
STATE OF ILLINOIS,
WITH
FORMS OF WILLS, CODICILS, PETITIONS, ORDERS, REPORTS, SETTLE-
MENTS, AND CLERKS' ENTRIES, USED IN COUNTY COURTS
IN THE ADMINISTRATION OF ESTATES.

By LEVI NORTH, Esq.,
OF THE HENRY COUNTY BAR.

CHICAGO:
CALLAGHAN & COMPANY,
LAW PUBLISHERS.
1875.

LA 15-294
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PREFACE.

THE following work was prepared to meet a want long felt by the Bar of Illinois, and by all others connected with the settlement of estates. The author has aimed to bring together, systematically arrange, and clearly state our local law applicable to those cases most likely to arise, in the probate of wills and the settlement of estates, and to make a work which will be thoroughly useful to the legal profession and to others. Experienced lawyers find it tedious to look up the law of wills and administration when they are compelled to examine the standard works upon those subjects, and the provisions of the statutes, and the decisions of our courts scattered through fifty-six volumes of our state reports; and younger members of the profession can hardly have the patience to do so. The great works by Jarman and Redfield contain much that is of no value to a lawyer in Illinois. Having been prepared for the use of the bar in general, and without any reference to the local laws of any state, they are necessarily in some of the most important particulars insufficient to satisfy our wants. Nevertheless, cases will frequently arise in which those works will be found of the greatest value. It is not therefore pretended that they can be dispensed with; for they cover much useful ground that it would not be advisable to include in a treatise like this.

In arranging this work it was intended that subjects should be treated of in the order in which they would naturally be presented for consideration in the settlement of estates.

The several chapters upon the competency of testators to make wills, and those upon contesting wills it is believed will be found highly useful to the profession.

A good deal of attention has been bestowed upon the chapters relating to the inventory and to the sale of real estate to pay debts; but not more than their importance seems to warrant.

Each section of the statutes relating to Wills, Administration and the Descent of Property, has either been copied or its substance stated, so that no reference to those statutes in other books will be necessary.

A large number of forms, embracing the most of those likely to be useful, will be found at the end of the volume; and references to them in the

text, and from them to the text, have been carefully made. In preparing these forms the author has freely borrowed from those commonly in use, but has struck out much of what he conceived to be surplusage, and has carefully conformed them to the provisions of the present statute. They are also made as nearly uniform in style as possible. Proceeding upon the principle that county courts have only inferior and special jurisdiction, each form, including those of clerk's entries, is intended to show all jurisdictional facts. The forms of clerk's entries it is believed will be found of great value to those officers. Upon a careful perusal of the probate records of several counties, there appears to the author to be the greatest imaginable confusion of ideas as to what they should contain, and the manner of making them up. There seems to be no theory among clerks concerning what is necessary to be shown by the record. A careful clerk, of long experience, and fully acquainted with the theory of entries, is of inestimable value to the public, and of great convenience to the court. For want of such a clerk, some county judges have been compelled to write out all of their orders at full length—those in reference to a single estate often covering many pages—to be copied into the records by the clerk. One would suppose that a clerk who deserves to hold his office ought to be able to enter a sufficient order from the mere minutes of the judge, except in cases requiring extraordinary consideration—and so relieve that officer from the performance of duties not his own. After all, it is advisable that the more important orders, such as those for the sale of real estate, should be prepared by counsel, who are fully acquainted with the facts, and approved by the judge, as in courts of equity. It would be inexcusable in a solicitor to leave the form of them to a clerk who knows nothing of the facts, and is presumably unacquainted with law; and not less so would it be to impose this burden upon the judge.

In all old and wealthy communities questions connected with the estates of deceased persons produce some of the most important litigation. Only a few years ago there were few wealthy estates in Illinois. The inhabitants came here poor. They were generally young and had not accumulated much property. Their pursuits were mainly agricultural, and when one died, his personal estate rarely amounted to more than a few hundred dollars, and his real estate generally reached no greater value. But now our state is full of old people who have accumulated large fortunes. In farming communities, estates of the value of fifty thousand dollars are very common, and in towns and cities their value sometimes reaches millions. All these accumulated riches must pass through the hands of personal representatives under the supervision of county courts. It is believed that in something less than every forty years—perhaps nearer each thirty years—all the property of the country is subjected to administration. In this are involved the rights of widows, children, creditors and legatees, the protection of which depends upon the legal knowledge, vigilance and integrity of judges, personal representatives and attorneys. if, therefore, measured by the amount of property in-

volved, and the position of the parties interested in the settlement of estates, it will appear, that the probate jurisdiction of county courts is of much greater importance to the people than the civil jurisdiction of circuit courts. And what a responsibility does this devolve upon judges of county courts. What a duty is theirs to guard the rights of widows, of minor children, of foreign heirs and creditors. How much of vigilance, how much of knowledge of law and of business, how much of integrity does their position require!

Nevertheless, men having large experience in business, declare that a county judge has no need of any special knowledge of law, or experience in the duties of his office. They look upon him as a kind of head book-keeper, to examine and pass upon the correctness and form of mere accounts. The prevalence of such opinions outside the bar of this state is a reason why the office of county judge has, in perhaps a majority of instances, been held by persons unlearned in law, and unacquainted with any but the simplest duties of the office. In some counties it is notorious that the county clerk performs the duties of both judge and clerk. But when both are ignorant of law, how do the blind lead the blind! In one of the most wealthy and populous counties of the state, only a few years ago, the county judge, a most reputable citizen, who had been a successful farmer, and had held several unimportant offices in his town, ordered the sale of lands to pay debts of an estate, without requiring the personal representatives to file a petition for the order.* His honesty was a poor substitute for legal knowledge, and the correctness of his motives could not be given in evidence in support of the worthless title conveyed by the administrator.

It is to be regretted that the legislature has shown a disposition to degrade the county courts. Whilst the Constitution of 1870, has given full power to confer sufficient jurisdiction upon these courts to elevate them to a dignity that would command all the requisite talent for the bench, there has been a steady resistance to the extension of that jurisdiction, and the incompetency of the present judges in some counties has been assigned as a reason for that resistance; as if that incompetency was not an almost necessary result of the inferior jurisdiction and a consequent inadequate and uncertain compensation for services, rather than that because the duties of the office are unimportant. Concurrent jurisdiction with circuit courts might be extended to county courts in certain cases, which would not interfere with probate business, for instance, in dower, partition, and other cases of a similar character, and perhaps in appeal causes. This increase of business would add to their dignity and importance, and be a just reason for increasing the compensation of county judges; and county courts would then command in every county in the state all the talent requisite to the discharge of their duties. Indeed, the increasing business of our circuit courts will drive the legis-

* In the case of *Monahan v. Van Dyke*, 27 Ill. 154, a similar blunder occurred.

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lature to extend the jurisdiction of county courts within a few years, or to provide other courts, for the purpose of relieving the circuit courts.

But whatever may be said upon the question of jurisdiction, the fact will remain that, in the case of county judges, as in that of all other public officers, it is simply shameful for them to accept the office without a previous reasonable preparation for its duties, and an honest effort afterwards to fully understand and faithfully and intelligently discharge those duties, whether sufficiently compensated or not. No thoroughly honest man would accept or retain an office under other circumstances.

KEWANEE, Sept. 29, 1873.

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PROBATE PRACTICE.

CHAPTER I.

DEFINITIONS.

- § 1. Last will and testament.
- 2. "Will" and "testament" used synonymously.
- 3. Codicil, an alteration of the will.
- 4. Devise.
- 5. Bequest.

§ 1. A last will and testament may be defined, as the disposition of one's property, to take effect after one's death,¹ and under the statute of Illinois, it may include the appointment of a guardian to have the custody and tuition of minor, unmarried children.

§ 2. The words "will" and "testament" are used synonymously in relation to the testamentary disposition of property.²

§ 3. A codicil is an addition to or alteration of a testament. It is sometimes defined as a supplement to a will.³

§ 4. The term devise is used to signify a testamentary disposition of real property. The term devise, properly and technically, applies only to real estate; the object must therefore be of that kind of property.⁴

§ 5. A bequest is a gift by will or testament; a legacy. This word is sometimes, though improperly, used as synonymous with devise. The distinction between them is this. The term bequest is applied more properly to a gift by will of a legacy, that is, of personal property; devise is more properly a gift by testament of real estate.⁴

¹ Redfield Wills, § 2, pl. 1 and notes.

² Bouvier L. D.; Shep. Touch. 399.

³ Bouvier, L. D.

⁴ Bouvier, L. D. This distinction is recognized in *Shackleford et al. v. Hall*, 19 Ill. 212.

CHAPTER II.

SUBJECTS OF TESTAMENTARY DISPOSITION.

§ 6. Property of all kinds, and the custody and tuition of minor children.

7. General principles.

§ 6. The subjects of testamentary disposition are specified by section 1 of the statute of Illinois, entitled Wills, to be "all the estate, right, title and interest, in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents, charged upon or issuing out of them; or goods and chattels; and personal estate of every description whatsoever." By section 5 of the statute entitled Guardians and Wards, it is provided that a father may, by last will, dispose of the custody and tuition of a child likely to be born, or of any living child, being a minor and unmarried, during the minority of such child, or for a less time; but no such will shall take effect to deprive the mother, during her life, of the custody and tuition of the child, without her consent, if she be a fit and competent person to have such custody and tuition. And the mother, being sole or surviving the father of her child, may, in like manner dispose of the custody and tuition of such child.

§ 7. Under the statute of Illinois, the power of the testator to dispose of his estate is unlimited, both as to person and object. He may pass by his own children and give it wholly to others. He may prescribe the time and mode in which the bounty shall be enjoyed, provided, that in doing so he contravenes no well recognized and admitted principle of public policy, or rule of right. The next of kin, no matter how near the degree of relationship, have no equitable right to their kinsman's estate. A disposition of it by will, like that by deed, determines its destiny. But in case of intestacy, the right of the next kin to the estate becomes a legal one.¹

¹ Rhoades v. Rhoades, 43 Ill. 239; Heuser v. Harris, 42 Ill. 425.

CHAPTER III.

EXECUTION OF WILLS.

PART I. PERSONS CAPABLE OF EXECUTING WILLS.

§ 8. Statutory provisions. Married women. Aliens.

9. When minors become of full age.

10. Ratification after becoming of full age.

11. Blind persons. Caution necessary to be observed.

12. Remarks by Mr. Jarman.

13. Incapacity not to be presumed from blindness alone.

14. Deaf and dumb persons.

15. Deaf, dumb and blind persons.

§ 8. Section 1 of the statute of Wills provides, that every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory, shall have power to execute a will. By this statute married women are placed upon the footing of others in respect to wills. And it is believed that alien friends may make a devise of lands. By the English common law, alien friends might execute a will of personal property, but they were incompetent to devise real estate. And alien enemies could not make a valid will of personal estate, without a special license to reside and transact business in the country during the continuance of hostilities.¹

§ 9. Males are of full age at twenty-one years, and females at eighteen years, which age is completed on the day preceding the anniversary of the person's birth: as, if a male was born on the fourth day of July, 1850, he would be of full age to do any legal act on the morning of the third day of July, 1871, and a female born on the same day would be of full age on the third day of July, 1868. The reason assigned is, that in law there is no fraction of a day, and if the birth was on the last second of one day, and the act on the first second of the

¹ 1 Redf. Wills, § 3, pl. 2.

day preceding twenty-one years after, then twenty-one years would be complete; and in law it is the same whether an act is done upon one moment of the day or another.²

§ 10. It seems that the English text-writers lay down the rule that the ratification by an infant after the testator arrives at the age required to execute a valid will, although executed before that age, renders it a valid instrument. "But it is very questionable," says Redfield, in commenting on this matter,³ "how far a will, executed while the testator is under legal disability, can be regarded a valid instrument, from the mere fact of its subsequent parol ratification by the testator, after the removal of such disability. It would seem, upon principle, that republication, according to the requirements of the statute would be necessary. We think it safe to lay down the rule, that where a will is required to be in writing and executed before witnesses, in order to its validity, and is thus executed before the testator arrives at the required age, it cannot be rendered valid, after the testator arrives at full age, except by republication with all the prescribed formalities."

§ 11. Blind persons labor under difficulties in making wills; but they are only slightly greater than if they could see, yet could not read. In either case the will should be carefully read over to the person executing the same, in presence of the attesting witnesses, in order to afford the fullest assurance that the execution was understandingly done.⁴ But the statute does not require this. And it has been held, that a will drawn and properly executed in presence of the testator, according to his instructions, and signed by him, although not read, to or by him, is a valid instrument.⁵

§ 12. But it has been wisely and thoughtfully said by Mr. Jarman, "that, in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in

² 1 Bl. Com. 463 and note; 2 Kent's Com. 233.

³ 1 Wills, § 4, pl. 3.

⁴ Wms. Ex'rs, 18; Day v. Day, 2 Green's Ch. 549.

⁵ Hess's Appeal, 43 Penn. St. 73.

the testamentary transaction, to be prepared with the clearest proof that no imposition has been practiced."⁶

§ 13. Blindness alone, whether congenital or accidental, has never been regarded as affording any ground for presuming mental incapacity to transact business, or make a will understandingly, but only as imposing upon those who assume to establish such acts, on the part of persons laboring under such defects, greater watchfulness in the transaction, and a corresponding clearness of proof, that they were done with full knowledge, and without constraint.⁷

§ 14. Until a comparatively recent period deaf and dumb persons were considered, *prima facie*, incapable of making wills, or entering into contracts.⁸ But when it was shown that such persons had understanding, or if they were not deaf from nativity, and could write or speak, having once acquired these abilities, they were regarded like other persons, capable of making a will.⁹ But since, at the present day it has been shown that this class of persons are capable of receiving a high degree of education, and of acquiring and communicating ideas and knowledge by means of writing and by signs, we apprehend an educated deaf mute is presumptively competent to manage his affairs and to make a valid will.¹⁰ He may perform the act of execution understandingly by means of a written communication.¹¹ And there is no reason why he may not do so by the sign language, where the witnesses are familiar with that language. But greater strictness of proof should be required in these cases than in others.

§ 15. There are persons, happily very few, who are deaf, dumb and blind, of whom, as a class, it could hardly be presumed they were competent to transact business and make

⁶ Jarman, Eng. ed. 1861, 29.

⁷ Wharton & Stille, Med. Jur. 141.

⁸ 1 Wms. Ex'rs, 16, 17; *Brown v. Fisher*, 4 Johns. Ch. 441. They were even held not responsible for crime. *Taylor's Med. Juris.* 690, 691.

⁹ 1 Wms. Ex'rs, 16.

¹⁰ See *Christmas v. Mitchell*, 3 Ired. Ch. 535, where it is said deaf mutes are not even presumptively defective in understanding.

¹¹ *Moore v. Moore*, 2 Bradf. Sur. 265.

wills; yet Laura Bridgeman, of Connecticut, one of these, was found capable of acquiring considerable knowledge, and of communicating ideas by means of the sense of touch, and doubtless could have executed a valid will.

CHAPTER III.

PART II. PERSONS INCAPABLE OF MAKING WILLS, FROM MENTAL DEFECT.

§ 16. General remarks.

17. Persons of unsound mind classified.
18. Insanity or mania, how it exhibits itself.
19. Its distinguishing feature is delusion.
20. If general, the subject is incapable of a testamentary act. If partial, may or not be.
21. Once established, insanity presumed to continue.
22. Delirium of disease.
23. Delirium from stimulus.
24. No presumption of continued incapacity in case of delirium.
25. Lucid intervals.
26. Idiots described.
27. Persons of weak mind. General remarks.
28. The case of *Roe v. Taylor* defining testamentary capacity.
29. Senile dementia defined.
30. No certain age beyond which testamentary incapacity may be presumed. The necessary capacity defined.
31. Intellectual feebleness alone said not to disqualify — cautions.
32. A case stated, from *Taylor's Med. Jurisprudence*.
33. Comments on the preparation of causes involving the question of mental capacity.

§ 16. We come now to consider the unsoundness of mind which renders persons incapable of making wills.

The establishment of wills which have been formally executed and witnessed, is usually opposed upon one or the other of the three following grounds.

1. The testator's unsoundness of mind.
2. Fraud, which is mentioned in the statute.
3. Undue influence exercised over him, which is included

in the idea of "compulsion or other improper conduct," expressed by the statute.

The last two grounds will be treated of hereafter.

§ 17. Those who are of unsound mind may, in a general way, be spoken of as insane persons, idiots, persons of weak mind, and persons demented by reason of old age, or, as it is called, senile dementia.

§ 18. Insanity, often called mania, exhibits itself in such a variety of ways at different times and in different individuals, as not to admit of exact description or classification. But for general purposes it may be defined to be, a disordered activity of one or more of the mental faculties, producing delusion, by reason of which persons believe things to exist which exist only, or at least in that degree exist only, in the imagination, and of the non-existence of which neither argument or proof can convince them.¹ When all or a considerable portion of the mental faculties are primarily affected, it is denominated general insanity; if one or a small portion of them are primarily affected, it is called partial insanity, or monomania. But the healthy faculties are in almost all cases more or less affected in their manifestation by the disordered activity of the others; their activity in some instances being increased, and in others perhaps diminished.² We are called upon here to consider the character and influence of insanity no further than it relates to the capacity of persons to dispose of property by will.

¹ See Redf. Wills, § 11 pl. 21 and notes.

² It would be useless even in a more extended work on wills to refer to all the tedious disquisitions on insanity, contained in writings on medical and criminal jurisprudence and mental philosophy, with their countless subtle refinements of language and ideas. No two authors seem to have the same idea of the number and character of the mental faculties, or of their separate or combined action or manifestation, either in health or disease. Hence they have no common standard of language, as applied to that subject, and their writings leave a most unpleasant confusion in the mind of the inquirer. Nor are the comments of learned judges an exception to this statement. At the bottom of all this difficulty lies the want of a sound mental philosophy, founded upon and conformable to, observed facts, and containing a clear recognition and definition of the mental faculties.

§ 19. The distinguishing feature of insanity is delusion ; which may exist as to one or more subjects, or in respect to one or more persons ; producing groundless liking for, or hatred or fear of, one or more persons, or a class of persons ; or overestimating or disregarding, liking or hating property and things ; or conceiving false and unnatural ideas of the relations of men and things ; or believing things to exist which do not exist.³

§ 20. Where the delusion is general, the party is incapable of making a will ; but where only one or a few faculties are implicated, he may or may not be competent for that purpose. And this will depend upon the question whether the delusion extends to the subject of his property, and to the relations between him and the natural objects of his bounty, as well as to the estimates he places upon the persons or purposes in whose favor he proposes to bestow it ; since in some cases the delusion exists only with reference to matters wholly disconnected from pecuniary and family affairs, leaving the mind to be guided in these by reason and a due regard to the duties, interests and rights of all parties concerned.⁴ Therefore, whenever it appears that the will is the direct offspring of the partial insanity or monomania under which the testator was laboring, it should be regarded as invalid, though his general capacity is unimpeached.⁵ But monomania ought not to be regarded as avoiding the testamentary act, unless the will is in some important way mixed up with the particular subjects of the testator's monomania.⁶

§ 21. The existence of insanity, either general or partial, having been established, the law presumes its continuance till the contrary is shown.⁷

³ It is of the essence of an insane delusion, that, as it has no basis in reason, so it cannot by reason be dispersed, and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent. Sir *James Wilde*, in *Smith v. Tibbitts*, Law Rep. 1 P. & D. 308.

⁴ See on this subject *Banks v. Goodfellow*, 2 Ch. Leg. News, 393, in Queen's Bench.

⁵ *Potts v. House*, 6 Ga. 324 ; *Townshend v. Townshend*, 7 Gill, 10 ; *Boyd v. Eby*, 8 Watts, 71.

⁶ 1 Redf. Wills, § 11, pl. 12 ; *Taylor's Med. Juris.* 656.

⁷ 1 Gr. Ev. § 42.

§ 22. The delirium of disease resembles insanity in some respects, producing mania and wildness, raving and incoherence of thought. Being the direct result of disease, it rises and falls with the disease, and wholly ceases with restoration to health. In fatal cases it is not unfrequently suspended, and the mind recovers a quiet condition some time before death.

§ 23. Delirium from stimulus is often carried to such an extent as to incapacitate one for executing a valid will. This is so when the testator is incapable of doing the act understandingly. And in cases of intoxication or habitual drunkenness, he must be so far under the dominion of delirium as not to understand the nature of the business in which he is engaged, and so be rendered incapable of giving his consent, or else be so much weakened in his capacity and purpose as to be chiefly under the control of others.⁸

§ 24. There is no presumption of continued incapacity in cases of delirium; on the contrary, it will be presumed to have ceased, after the lapse of such a period of time as commonly produces restoration from such causes.⁹

§ 25. In mania there occur what are called lucid intervals, when the mind resumes its natural serenity, and all its faculties their usual balance of activity and power; when consciousness, the observing and reasoning faculties, the sentiments and feelings manifest themselves harmoniously. These intervals must be distinguished from a remission, in which there is a mere abatement of the symptoms. During a lucid interval one may execute a valid will; but when it is attacked on the ground of the testator's insanity, the fact of its being executed during a lucid interval must be made clearly to appear;¹⁰ for insanity shown to exist prior to the will, is presumed to have continued, unless the contrary is satisfactorily shown.

In some instances lucid intervals appear with great regularity for years, and continue for a considerable length of time.

§ 26. Idiots may be described as persons who, from birth are

⁸ 1 Redf. Wills, §12, pl. 2; *Barrett v. Buxton*, 2 Aik. 167.

⁹ *Hix v. Whittemore*, 4 Met. 545.

¹⁰ *Gombault v. Pub. Admr.* 4 Bradf. Sur. 296.

possessed of little or no power to observe, remember and reason, capable of only the most limited mental improvement, and unable to comprehend the social relations and the uses and value of property. They are therefore incapable of executing wills.

§ 27. We have elsewhere spoken of the disabilities of idiots, insane persons, and those demented by reason of old age. But there is still a large class of persons entitled to consideration, who do not strictly rank with either of these. They are such as have greater mental power than idiots, and yet less than the average of men. In some, their mental faculties are evenly, and in others unevenly, balanced as to strength. In some their weakness exists from birth, in others it is the result of disease. In all it is easily noticeable, but often produces serious difficulty in determining whether testamentary capacity exists. Concerning these persons as well as the insane, the language of courts and of writers on medical jurisprudence is far from uniform.

§ 28. In the case of *Roe v. Taylor*, 45 Ill. 485, the supreme court lay down the rule as to testamentary capacity in conformity to the best considered opinions of other courts, reaching the conclusion, that a testator possesses testamentary capacity, within the meaning of the law, when he has an understanding of the nature of the business in which he is engaged, of the kind and value of the property devised, and of the persons who are the natural objects of his bounty, and of the manner in which he desires it distributed, unless affected by some morbid and insane delusion, as to some one of those objects of his bounty.¹¹

§ 29. In the greater number of testamentary cases where mental incapacity is alleged as a ground for setting aside the will, the unsoundness of mind is of the character called *senile dementia*; which is a weakness of the mental powers in advanced age, indicated the most noticeably by loss of memory, incoherence of speech and reason, and by childishness of demeanor.

¹¹ *Kinne v. Kinne*, 9 Conn. 102; *Comstock v. Hadlyme*, 8 Conn. 265, are of the same purport. See post, §§ 30, 31.

Perhaps there is no class of cases which will more severely test the judgment of the counsel, the court and the jury. Here, as in all other discussions on questions pertaining to the mind, there is a want of exactness of description and definition, and little uniformity of opinion upon the subject among authors; and the testimony of medical experts upon the trial, too often somewhat partizan, and uttered in stilted phrase, serves to befog the minds of all parties.

§ 30. But there are certain principles which are generally assented to, among which may be mentioned the following: there is no certain age beyond which a testator is presumed incompetent to make a will. Extreme old age may, however, properly raise some doubt of capacity, but only so far as to excite the vigilance of the court.¹² In order to make a valid will, a testator must have so much mind and memory as would enable him to transact common business with that intelligence which belongs to the weakest class of sound minds; but he may not have sufficient strength of memory and vigor of intellect, to make and to digest all parts of a contract, and yet be competent to direct the distribution of his property by will.¹³ In the case of *Harrison v. Rowan*, 3 Wash. C. C. 580, Mr. Justice Washington said: "A man may be capable of making a will, and yet be incapable of making a contract, or to manage his estate." But this would seem to be going to, if not stepping over the verge of allowable testamentary capacity.

§ 31. It seems to be established that intellectual feebleness alone will not disqualify one for making a will.¹⁴ But there is a large class of cases where the testaments of aged people come in controversy, that the element of undue influence, imposition, or fraud is mixed up with the weakness and imbecility of mind of the testator. In such cases courts and juries should be reasonably watchful to see that no improper influence has been

¹² *Kinleside v. Harrison*, 2 Phillim. 449.

¹³ *Stevens v. Van Cleve*, 4 Wash. C. C. 262.

¹⁴ *Elliot's Will*, 2 J. J. Marsh. 340, *Dornick v. Reichenback*, 10 S. & R. 84; *Blanchard v. Nestle*, 3 Denio, 37. But see ante, § 28. The statement in the text should be considerably qualified as to the principle.

exercised, in the production of an unjust or unequal distribution of the testator's property. In other words, that if the will was executed, at a time when the testator was in a condition of mind susceptible of being easily controlled, and the will itself is one giving unequal advantages towards parties in a position to have brought their influences to bear upon the testator, the triers of its validity have a right to require those, thus exposed to suspicion, to prove, with reasonable certainty, that the will was the offspring of the free agency of the testator.¹⁵ Hence it is very properly said, that where a will is just and equal, and displays reason, memory, and benevolence [and we should add, justice], and the same was made without advice or dictation, it may be regarded as satisfactory evidence, that it was the product of a disposing mind.¹⁶

§ 32. Another case may be noticed which often occurs in the experience of lawyers, and to which, in attendance on aged persons, medical gentlemen do not sufficiently attend. A person's mind in extreme old age may be quite intelligent, his understanding of business clear, and his competency to converse upon and transact it, undoubted, and his bodily strength good; but there may grow upon him such a fear and dread of relatives who may have surrounded him, and on whom he may have become perfectly dependent, that his nervous system is wholly overcome, and he becomes a mere child and tool in the hands of those about him; so that he has no power to exert his mind in opposition to their wishes, or to resist their importunities. His mind is enslaved by his fears and feeling of helplessness, so that to that extent, and in matters in which he may be moved by them, he really is facile and imbecile. This state of things seems in great old age, easily brought on; the faculties are otherwise entire, and the bodily strength considerable.¹⁷

§ 33. In the preparation and trial of cases involving the question of the testator's mental capacity, a great variety of facts

¹⁵ Ibid.

¹⁶ *McDaniel's Will*, 2 J. J. Marsh. 331.

¹⁷ *Taylor's Med. Juris.* 659.

sometimes present themselves for consideration ; such as, the amount and character of the property to be disposed of by the will, and the complexity of the provisions made by the same ; the length of time required by the will for the complete execution of its provisions, the contingencies which might arise to defeat those provisions, and the care taken to provide against such defeat. And it would seem to be quite obvious that if the testator's estate was small and consisted of but few items, as if, for instance, he had devised the use of his land to his wife during her life, and bequeathed all his personal estate to her, making thereby a provision only sufficient for her support and that of her minor children,—under such circumstances, a far inferior degree of mental capacity would be deemed competent for the business, than would be required, if the estate consisted of city property, farming lands, leasehold interests, stocks in manufacturing, banking and railroad corporations, and miscellaneous personal property, to be disposed of by one who owed numerous debts and had a large family, consisting of children by more than one wife, and surrounded by circumstances calling for great consideration and careful provisions against contingencies. The questions in either case would, after all, be, had the testator sufficient mental capacity to dispose of the particular estate he possessed, under the peculiar conditions of that estate, and of his business affairs and family relations. And so far as the will itself is concerned, its provisions might be scrutinized in the light of the testator's family circumstances, and the character, extent and condition of his estate, to see if they furnish evidence of the exercise of a sound mind.¹⁸

¹⁸ In *McAdam v. Walker*, 1 Dow, 178, Lord Chancellor *Eldon* mentions a case, in which he had been counsel, and the will was established, although the testator had been sometime insane, at its date, and was confined in a madhouse till the day of his death. But the will was sustained chiefly on the ground of its innate reasonableness and propriety, as it would seem from his lordship's report of the case ; as it was expressed upon the ground that the will, although voluminous and complicated was "proper and natural," proportioning the different provisions with the most prudent and proper care, with a due regard to what he had before done for the objects of his bounty, and in strict conformity with what he had

CHAPTER IV.

EXECUTION OF WILLS, CODICILS AND NUNCUPATIVE WILLS.

- § 34. Statutory provisions — to be in writing, signed and witnessed.
- 35. What the statute requires and what it does not.
- 36. The several things which must concur.
- 37. Will to be reduced to writing, but is sufficient if written with a pencil.
- 38. What is a sufficient signing.
- 39. Will may be signed by another person.
- 40. Where the signature must appear.
- 41. Where signed by another, it must be done in the testator's presence.
- 42. Witness may sign by mark — no particular form of attestation, nor any testamentum clause necessary.
- 43. Necessity of witnesses signing in presence of the testator.
- 44. Witnesses must be credible. Comments.
- 45. Weight of testimony of subscribing witnesses.
- 46. Will void as to witness who is a beneficial devisee or legatee, with one exception, and he may be compelled to testify.
- 47. When husband or wife of the testatrix or testator is a witness — its effect.
- 47a When creditor whose claim is secured by the provisions of a will is a witness, he is competent.
- 48. Codicils are executed, witnessed and proved in all respects the same as wills.
- 49. Codicils however numerous are regarded as parts of the will.
- 50. Publication of a will not required, and if cancelled or revoked a will cannot be republished, but must be revived by codicil.
- 51. Codicil presumed to be a part of testator's *last* will, and if one of two wills has been cancelled it will be presumed to relate to the one not cancelled.

declared, before his malady, he intended to do. But in *Clarke v. Lear*, cited 1 Philim. 119, an opposite result was arrived at, upon the ground that the provisions of the will were unnatural and unreasonable. In *Thompson v. Thompson*, 21 Barb. 107, it was held that, where there is evident ground to infer from the will and the surrounding facts that the testator must have exercised reason and judgment in the disposition of his estate, showing the possession and exercise of his logical powers, the will cannot be set aside, because the testator entertained exaggerated and absurd opinions upon certain subjects.

- § 52. A codicil may operate independent of any will, but is *prima facie* part of a will.
53. If written upon or clearly refers to the will, the proof of the codicil alone establishes such part of the will as is not revoked.
54. Reference in the codicil to a will — its effect.
55. Later will sometimes treated as a codicil.
56. Nuncupative wills. How executed. Statutory provisions.
57. How proved. Statutory provisions.
58. Caton, J., remarks in *Arnett v. Arnett*, concerning the execution and proof quoted.
59. Both witnesses must hear and swear to the same statement of the testator.

§ 34. Section 2 of the statute of Wills provides that, "all wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses."

§ 35. The statute has declared exactly what is requisite to the valid execution of a will, and nothing more can be necessary, and nothing less will be sufficient. Before seeing what it does require, it may be well to notice some things which it does not. It does not require a seal¹; it does not require publication²—by which is meant, a declaration by the party that he means to give effect to the paper as his will; it does not require the subscribing witnesses to sign the will at the same time,³ or in the presence of each other.⁴

§ 36. The statute requires the concurrence of the following facts in order to the valid execution of a will:

1. It must be in writing.
2. It must be signed by the testator; or

¹ But when done in the execution of a power specially required to be done under seal, a seal would be indispensable. *Hight v. Wilson*, 1 Dall. 94.

² *Diekie v. Carter*, 42 Ill. 377; *Arndt v. Arndt*, 1 S. & R. 256; *Piatt v. McCullough*, 1 McLean, 69.

³ 2 Bl. Com. 377. *Bond v. Seawell*, 3 Burr. 1773.

⁴ *Flynn v. Owen* (Sup. Ct. Ills. 1872), 5 Leg. News, 208.

3. By some person in his presence, and by his direction.

4. It must be attested in his presence, by two or more credible witnesses.

These several requisites will be examined in their order.

§ 37. The will must be reduced to writing. But it would seem that it would suffice, if in print and signed by the testator.⁵ And it has been held that a will written in pencil would be good.⁶

§ 38. It must be signed by the testator. It is not however necessary to write the christian name in full; the initial letter is sufficient.⁷ And the testator may sign by making his mark in the usual manner; and it is not necessary to prove that he could not write his name at the time.⁸

§ 39. A will may be signed by another person in the testator's presence, and by his direction. This may be done by a subscribing witness.⁹ And it is said the execution will be valid, if the person executing the will on behalf of the testator, by mistake, signs his own name instead of the testator's.¹⁰ Only one signature is required when the will consists of more than one sheet, or piece of paper, when that is affixed with intent thereby to sign the whole instrument.¹¹

§ 40. It is not indispensable that the will shall be signed at the end of it. The testator's name may appear elsewhere.¹² It is necessary that the name of the testator, in whatever part of the will it appears, should either have been written or adopted by him, as the final act of execution. A will written by the testator, and beginning, "I, A. B., do make," etc., has been held to be sufficiently signed.¹³ Sealing a will is not equivalent to signing, and is insufficient.¹⁴

⁵ 2 Bl. Comm. 376, Chitty's notes. *Schneider v. Norris*, 2 M. & S. 286.

⁶ *In re Dyer*, 1 Hagg. 219.

⁷ 1 Jarman, 73.

⁸ 1 Redf. Wills, 203 and notes.

⁹ *In re Bailey*, 1 Curteis, 914; *Smith v. Harris*, 1 Rob. 262.

¹⁰ *Re Clark*, 2 Curteis, 329.

¹¹ *Winsor v. Pratt*, 5 J. B. Moore, 484.

¹² *Lemayne v. Stanley*, 3 Lev. 1; *Adams v. Field*, 21 Vt. 256; 1 Redf. Wills, § 18, pl. 26.

¹³ 2 Greenleaf Ev. § 674; 1 Redf. Wills, § 18, pl. 10, 11 and notes.

¹⁴ 1 Redf. Wills. § 1, pl. 5.

§ 41. Where the testator's name is signed to the will by another person, it must be done in his presence, and by his direction. The language of the statute is so clear, that it seems never to have undergone judicial construction in the higher courts. The supreme court, in *Allison v Allison*, 46 Ill. 61, in its judgment concerning the testator's acknowledgment of the execution, said, "the statute does not require the acknowledgment to be in language," so it might properly be said that his direction to sign his name need not be in language. Any words or actions, clearly evincing his desire to have it signed by another, or his approval or ratification of it after it was signed, would be sufficient. And as to signing the testator's name in his presence, the principle which governs the attesting of wills in the maker's presence would doubtless apply.

§ 42. The will must be attested in the testator's presence, by two or more credible witnesses. And here, as in the case of the testator, a mark made by a witness as his signature, is a sufficient attestation. No particular form of words is necessary in the attestation clause, nor need it express that the witnesses signed in the presence of the testator, it being sufficient if this is actually proved.¹⁵ Indeed, no testamentary clause is necessary; nor is it essential on what part of the paper the witnesses names are written.¹⁶

¹⁵ 2 Gr. Ev. § 677; 1 Redf. Wills, § 19, pl. 6, and note 14. And see post, § 162-165. Where the will is executed under a power, all the formalities required by the power should be complied with, both in the body of the will and in the attestation. And see 1 Redfield Wills, §§ 21, 26, 27, 28, 29, 30, 31. As to advantages of a testamentary clause, see id., § 23, pl. 10; § 19, pl. 14-16. It is obvious that such a clause can have no conceivable value except in case of the death of the witnesses before the probate, or their forgetfulness of what occurred. In both cases it would afford a strong presumption that the matters therein stated actually occurred. But it has been held that where their testimony directly negatives the due execution, and is not rebutted, either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the court cannot, by reason of a formal attestation clause, and on the presumption *omnia esse rite acta*, pronounce for the will. *Craft v. Craft*, 4 Swab. & Tristram, 40, cited 1 Leg-News, 19.

¹⁶ *Roberts v. Phillips*, 4 Ellis & Bl. 450; S. C. 30 Eng. L. & Eq. 147. In this case Lord *Campbell*, Ch. J., said: "A testamentary clause not being

§ 43. The requisition that the witnesses shall subscribe their names in the presence of the testator, is in order that he may have ocular evidence of the identity of the instrument attested as his will, and to prevent the fraudulent substitution of another. To constitute this "presence," it is necessary, not only that the testator be corporally present, but that he be mentally capable of recognizing, and be actually conscious of, the act which is performed before him. Therefore, if, after he has signed and published his will, and before the witnesses subscribed it, he falls into a state of insensibility, whether temporary or permanent; or, if the will is subscribed by the witnesses in a secret and clandestine manner, without his knowledge, though it be in the same apartment; in either case it is void. To be corporally present, it is not essential that the testator be in the same apartment; for if the situation and circumstances of the parties are such, that the testator in his actual position might have seen the act of attestation, it is enough, though they are not in the same apartment, nor even in the same house; and on the other hand, if his view of the proceedings is necessarily obstructed, the mere proximity of the places of his signature and of their attestation, will not suffice, even though it were in the same apartment. An attestation, made in the same room with the testator, is presumed to have been made in his presence until the contrary is shown; and an attestation not made in the same room, is presumed not to have been made in his presence, until it is shown to have been made otherwise.¹⁷

§ 44. The witnesses must be "credible." A credible witness is generally defined to be one worthy of belief; but, as used in this statute, it would seem to be one who is also competent under the laws of the state. As to the period at which the witnesses must be competent, the weight of authorities is

indispensable, we conceive that its absence would only make a difference in the extrinsic evidence which would be required to prove that the witnesses has seen the testator execute the will, and that they signed it with the intention of attesting it, at his request and in his presence. Clear and satisfactory proof must be given upon these points.

¹⁷ 2 Gr. Ev. § 678.

clearly that it must be at the time of the execution. For, says Mr. Greenleaf, "The attesting witnesses are regarded in law as placed around the testator, in order that no fraud may be practiced upon him, in the execution of the will, and to judge of his capacity."¹⁸

§ 45. The testimony of the subscribing witnesses to the execution of the will, must prevail, unless impeached, and should not be disregarded, upon proof of the simple improbability of their statement.¹⁹ And where proof of the attestation of a deceased subscribing witness is relied upon, evidence of the bad character of such witness is admissible for the purpose of rebutting the presumption of the due execution of the instrument, arising from the attestation of the witness.²⁰ And where the sole legatee in a will admitted that it was a forgery, this admission was adjudged sufficient to defeat the will, notwithstanding the depositions of both the subscribing witnesses to its due execution.²¹

§ 46. Where a *beneficial* devise, legacy or interest is made or given in a will, to an attesting witness, the will is void as to him and to all persons claiming under him, unless it was attested by two other witnesses who are competent; and he may be compelled to testify to its execution. But if he would have been entitled to any share of the testator's estate in case the will should not be established, there will be saved to him an amount thereof not exceeding in value the devise or bequest.²²

Under the English statute (25 Geo. II. ch. 6) containing a similar provision, it has been held that this does not extend to an executor or devisee in trust.²³ And the same has been held in Kentucky under the section from which the Illinois statute

¹⁸ Ib. § 691; 1 Redf. Wills, § 21, pl. 1-6 and notes. See particularly *Sears v. Dillingham*, 12 Mass. 358.

¹⁹ *Boylan v. Meeker*, 4 Dutcher, 274.

²⁰ *Losee v. Losee*, 2 Hill, 609; *Colvin v. Warford*, 20 Md. 357, 387.

²¹ *Blatner v. Weis*, 19 Ill. 246; 1 Gr. Ev. § 180.

²² Stat. Wills, § 8.

²³ *Lowe v. Joliffe*, 1 W. Bl. 365; *Anon.* 1 Mod. 107; *Goodtitle v. Wellford*, Doug. 139; *Phipps v. Pitcher*, 6 Taunt. 220; *Bettison v. Bromley*, 12 East. 250.

was copied.²⁴ But where he is entitled to commissions on personal property, it has been held that an interest is thereby created which renders him incompetent. The decisions, are, however, conflicting on this point.²⁵

§ 47. It has been decided that if either a husband or a wife is a witness to a will containing a bequest to the other, such bequest is void, and the witness is competent.²⁶

§ 47a. Where lands, tenements, or hereditaments are charged with any debt by a will, and the creditor whose debt is so secured attests such a will, such creditor is nevertheless a competent witness.²⁷

§ 48. The statute, it will be perceived, makes no difference between codicils and wills, as to the mode of executing, attesting and proving the same, nor as to the capacity of the testator, or the number and character of the attesting witnesses.

§ 49. It is universally conceded that all codicils, however numerous, are to be regarded as parts of the will, and all, together with the will, are to be construed as one instrument.²⁸ And where there is a conflict between the provisions of the two, those of the latter will prevail.

§ 50. Publication not being required by the statute, there can be no such thing as "republication" of the will; but a will which has been revoked by a subsequent one, or where any of its provisions have been modified by a codicil, may be revived, or such modified provisions restored by a codicil; but it should clearly recognize the existence of the will.²⁹ A codicil may be used to set up an informal paper intended for a will, but it must be clearly identified by the codicil relied upon for that purpose.³⁰

²⁴ Orndorf v. Hummer, 12 B. Mon. 619; and under a similar statute of New York in McDonough v. Laughlin, 20 Barb. 238.

²⁵ 1 Redf. Wills, §§ 21, 9, and notes. But under the statute of Illinois, Tit. Evidence, § 1, *quære?*

²⁶ Jackson v. Wood, 1 Johns. Ca. 163; Jackson v. Durland, 2 Johns. Ca. 314. See Ill. Stat. Tit. Evidence and Depositions, § 8.

²⁷ Stat. Wills, § 20.

²⁸ 1 Redf. Wills, § 23a, pl. 4; Van Cortlandt v. Kip, 1 Hill, 590.

²⁹ 1 Redf. Wills, § 23a, pl. 5; *Ib.* § 29, pl. 3.

³⁰ Tonnale v. Hall, 4 Comst. 140.

§ 51. The law presumes that a codicil is made as a part of the testator's last will, if there is two in existence at the same time, but if one of them has been cancelled or revoked, so as to be no longer in existence, as a valid operative instrument, the codicil will be presumed to have been intended to form a part of the will then in existence and in force.³¹

§ 52. The provisions of a codicil are sometimes such that it may operate independent of the will, and be effective, although the will is destroyed. But a codicil is *prima facie* dependent upon the will, and where the will and codicil to it are shown to have been in existence, and the will has been destroyed, the burden of proof is upon the party setting up the codicil, to show that it was the testator's intention to have it operate separately from the will, otherwise the presumption is that the destruction of the will was intended as a revocation of both.³²

§ 53. Where a codicil to a will is written upon the same paper as the will, or though written upon another paper, clearly refers to and indentifies the will, proof of the codicil is sufficient to establish such portions of the will as are not thereby revoked.³³

§ 54. A reference in the codicil to the will, by the words "my will," is generally construed to embrace all the existing testamentary papers in force.³⁴ And the recognition of a prior revoked will, by date or otherwise, as the will on which the codicil is founded, shows an intention and will have the effect to revive it.³⁵ And where the codicil refers to the former of two inconsistent wills, by date, as the last will of the testator, it has the effect to revoke the intermediate, and evidence of mistake cannot be admitted.³⁶

§ 55. A later will is often treated as being merely in the nature of a codicil, intended to supply the deficiencies of the will and to make desired alterations of the same. And in this

³¹ *Hale v. Takelove*, 2 Rob. 326; *Crosbie v. Macdoul*, 4 Ves. 616.

³² 1 Redf. Wills, § 23*a*, pl. 11. But see *Ib.* § 25, pl. 16, 17 and notes.

³³ *Duncan v. Duncan*, 23 Ill. 364, and cases cited.

³⁴ *Crosbie v. Macdoul*, 4 Vesey, 610.

³⁵ *Payne v. Trappes*, 1 Rob. 583; *Re Chapman*, 1 Rob. 1; 8 Jur. 902.

³⁶ *Crosbie v. Macdoul*, *supra*.

view, a specific devise of real estate was held not revoked by a subsequent will, making a general residuary devise to another person.³⁷

§ 56. The statute, title Wills, § 15, provides, that a nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days after the making thereof, and proven before the county court by two or more credible, disinterested witnesses, who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the words, and that they believed him to be of sound mind and memory; and that he did at the same time, desire the persons present, or some of them, to bear witness that such was his will, or words to that effect; and that such will was made in the time of the last sickness of the testator; and it being also proven by two disinterested witnesses other than those hereinbefore mentioned, that the said will was reduced to writing within ten days after the death of the testator; and no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said court shall be sufficient to invalidate or destroy the same; and all such wills, when so proven and authenticated, shall be recorded in like manner as other wills are directed to be recorded by law: *Provided*, that no letters testamentary shall be granted on such will, until the expiration of sixty days after the death of the testator.*

§ 57. Section 16 further provides, that when a nuncupative will shall be proved and recorded as aforesaid, the court shall issue a citation to the heirs and legal representatives of the testator, if they reside in the county; if not, the court shall cause an advertisement to be inserted in some one of the newspapers printed in this state, notifying the heirs and legal representatives of the testator, at what time and place letters testamentary will be granted upon such will, requiring them and each of them to appear and show cause, if any they have, why

³⁷ *Freeman v. Freeman*, 5 Deg. M. & G. 704.

* See *Harrington v. Stees*, 6 Leg. News, 311.

letters testamentary should not be granted; and if no sufficient cause be shown, letters shall be granted thereon, as in other cases.

§ 58. The ninth section of the old statute, of which the fifteenth section, just quoted, is a copy, underwent a partial construction in the case of *Arnett v. Arnett*, 27 Ill. 247; in which case the proof of the will did not show that the testator, at the time of speaking and publishing thereof, did desire the persons present, or some of them, to bear witness that such was his will, or words to that effect. Chief Justice *Caton* says, "While we should not be inclined to require an exact conformity to the literal requirements of this statute, in the publication of a nuncupative will, yet we are not authorized or inclined to dispense with a substantial compliance with all its provisions. * * It is not enough that the words of the will alone should be spoken in the presence of those who might bear witness to it; but the testator must also use some words indicating his desire or wish that those present, or some of them, should bear witness that such was his will. We will not say that signs and gestures might not be so distinct and intelligible as to sufficiently indicate the desire of the testator that he wished those present to bear witness to the will, as to amount, substantially, to words of that import; but it would have to be a very marked and unequivocal case to dispense with words actually pronounced, to the effect of those mentioned in the statute. But here we find nothing to satisfy this last clause quoted. No word was spoken, no sign made, no indication manifested, that the testator desired any one present to bear witness to his declared wishes. There is nothing to show that he ever expected or wished that any one present should remember what he had said, or should ever repeat those declarations, or should ever go before any tribunal to prove that such was his will." For want of this statutory requirement the will was declared void.

§ 59. All that is understood by calling the witnesses to a nuncupative will is that the testator intends his declarations as his last will, and that the witnesses so understand them, and that they are relied upon as the witnesses to hear and remem-

ber the words.³⁸ And the two witnesses required by the statute, to the execution of the will, must both hear the same declaration, and it is not sufficient that each heard different declarations at different times.³⁹ Where the two witnesses required by the statute to prove a nuncupative will, do not agree as regards the will, it is only established so far as they do agree.⁴⁰

CHAPTER V.

REVOCATION OF WILLS.

- § 60. Statutory provisions. Burning, cancelling, tearing, obliterating, — subsequent marriage.
61. Intent to revoke absolutely essential.
 62. Tearing and throwing upon the fire.—A case.
 63. Part may be revoked by obliteration. Destroying with intent to make another, is a revocation. Revoking former will supposing a later one is valid, is not effectual.
 64. Partial obliteration not always effectual.
 65. Erasures if illegible treated as blanks.
 66. Revoking a later will leaves an earlier, inconsistent one not revoked by burning, tearing, cancelling or obliterating, in full force.
 67. Where will is executed in duplicate, the destruction of one does not revoke the other, both being in testator's possession.
 68. "Tearing" includes cutting: cutting out a part—effect.
 69. If executed as a sealed instrument, tearing off seal with intent to revoke operates as a revocation.
 70. Act and intent must concur.
 71. Cancellation defined.
 72. Soundness of mind and memory necessary to a valid revocation.
 73. Presumption of revocation — cases stated in which it arises.
 74. Same subject.
 75. Upon what real property a will operates.
 76. A valid agreement to convey operates as a revocation. Cases stated.
 78. Sale of a large portion of the real estate — its effect.
 79. Effect of a subsequent will or codicil — comments.
 80. The provisions of the later of two inconsistent wills, prevails so far as the inconsistency extends.
 81. Revocation of a particular legacy, if there is no other disposition made of it, produces intestacy to that extent.

³⁸ *Hatcher v. Millard*, 2 Cald. (Tenn.) 80.

³⁹ *Tally v. Butterworth*, 10 Yerger, 501.

⁴⁰ *Portwood v. Hunter*, 6 B. Mon. 538.

§ 60. The statute, § 17, declares that no will or codicil shall be revoked otherwise than by burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will or codicil, in writing, declaring the same, signed by the testator or testatrix, in presence of two or more witnesses; and no words spoken shall revoke or annul any will or codicil in writing, executed as aforesaid in due form of law. By section 10, titte Descendit, it is declared that marriage shall be deemed a revocation of a prior will.¹

§ 61. Under statutes identical with this, it has been well settled that the mere acts named in section 17 will not constitute a valid revocation, unless done with the intent to revoke. Intent is an essential element in the act of revocation.²

§ 62. Where a testator called for his will, which was handed him while in bed, and he gave it "something of a rip with his hands, and so tore as almost to tear a bit off, then rumbled it together and threw it on the fire, but it fell off," and one of his servants took it up and preserved, or it would soon have been burnt up; and the testator being informed it was not destroyed, constantly insisted it should be, until he was finally

¹ This provision in sec. 10, was not in the former statute. But it was held in *Tyler v. Tyler*, 19 Ill. 151, that marriage subsequent to the date of the will operated as a revocation of such will, and this was so whether there was issue of the marriage or not. The policy of this provision, which has no exception, and the reasoning in the case of *Tyler v. Tyler*, are, to say the least, very questionable. To sustain such a will cannot injure the widow, for she may and naturally would avoid it by electing to take under the statute. See *Sturgis v. Ewing*, 18 Ill. 176. If the wife does not survive the husband, there is certainly no excuse on her account to treat the will as a nullity. If children are born of the marriage, and they survive the testator, then there is a just cause for treating the will as revoked. If they do not survive him, and the wife does, then there is no reason why the will should not operate upon one half of the real estate; and if both wife and children die before the testator, there is not a shadow of reason why the will should not be operative as if the testator had not married after it was made. The statute of New York very wisely declares that marriage subsequent to the will shall not amount to a revocation only in case the wife or issue shall be living at the testator's death.

² *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Dan v. Brown*, 4 Cow. 490; post, § 72.

informed it had been, it was held a sufficient revocation.³ The Chief Justice remarked in this case, that "The statute has specified four" modes of revocation, "and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. Throwing it on the fire, with the intent to burn, though it is only very slightly singed and falls off, is sufficient within the statute."⁴

§ 63. A portion of a will may be revoked by obliteration by the testator, without revoking the remaining parts.⁵ And if the testator destroys his will with the mere general purpose of thereafter making another, the revocation becomes effectual, though he dies without carrying such purpose of making a new will into effect.⁶ It is only where the testator revokes a former will, upon the supposition that he has executed a subsequent valid will, which proves invalid, that the act of revocation is held incomplete.⁶

§ 64. Partial obliterations do not always amount to a revocation, for they may be dependent upon a condition; as where the testator makes obliterations only with a view to substitute other provisions in lieu of those erased, and where it is obvious, that the making of the one depended upon the supposed validity of the other, in the mind of the testator, and that the erasures would not have been made, except upon the condition that the substituted portions could, and would become operative, it has been uniformly held, that where the alterations, or additions, have not been so executed as to become valid portions of the instrument, the erasures cannot be treated as effective revocations of those portions even.⁷ Thus, in *Wolf v. Bolinger*,⁸ a will devising estate to Wolf was altered by the testator, by drawing lines through that name, but not obliteration.

³ *Bibb v. Thomas*, 2 W. Bl. 1043. But see also 1 Redf. Wills, § 25, pl. 31 and notes.

⁴ See *Dan v. Brown*, 4 Cowen, 490; *Johnson v. Brailsford*, 2 Nott & McC. 272.

⁵ *Sutton v. Sutton*, 2 Cowp. 812, 451.

⁶ *Williams v. Tyley*, 1 Johns. Ch. 530. 1 Redf. Wills, § 25, pl. 49.

⁷ 1 Redf. Wills, § 25, pl. 44, and note.

⁸ Sup. Ct. Illinois, 1872, 5 Leg. News. 112.

ting it so that it could not be read, and by interlining the name of Bolinger above, and the alteration was not attested by two witnesses in presence of the testator; Held, that the interlineation for want of attestation according to law, did not operate to change the will; and also that the cancelling of one name and the substitution of another were concurrent acts tending to the same purpose, that is to give the property to Bolinger, and the failure to do this prevented the cancellation also from taking effect, and left the will to stand as it was before the alteration was attempted.

§ 65. Where the testator makes an erasure, rendering a portion of the will illegible, probate will be allowed, and the illegible portions treated as blanks.⁹ And where the testator makes an alteration in his will by erasure and interlineation, or in any other mode, without authenticating the alteration, by a new attestation in presence of witnesses, as required by statute, it will be presumed that the erasure was intended to be dependent upon the alterations going into effect as a substitute, and such alterations not being valid for want of re-attestation, the will stands in force, the same as it did before, so far as it is legible after the attempted alteration.¹⁰ And where the testator struck out the name of one trustee, and inserted two other names and made some other alterations, but did not republish the will, it was held not to affect the gift in any respect; and also that the trustee, whose name remained legible, must act as sole trustee.¹¹

⁹ *Re James*, 1 Sev. & Tr. 238; 1 Jarman, 133; *In re John Williams' Will*, 5 Leg. News, 112.

¹⁰ 1 Redf. Wills, § 25, pl. 22, 44 and notes; *Re Parr*, 6 Jur. N.S. 56. In *Jackson v. Halloway*, 7 Johns. 394, the will was altered by erasures and interlineations, so as to enlarge its operation and not to restrict its former provisions, and the testator endorsed and signed a memorandum on the will, stating the alterations he had made, but the memorandum, which was attested by only two witnesses, the statute requiring three; held the erasures did not destroy the devise, but the alterations could not operate; citing *Onions v. Tyrer*, 1 P. Wms. 343, n. 1, and *Short v. Smith*, 4 East, 419.

¹¹ *Short v. Smith*, 4 East. 419; *Wolf v. Bolinger*, 5 Leg. News, 112, where it is, also said the power to try and determine whether the writing produced is the will of the testator or not, includes the power to adjudge

And where there is a codicil to the will which takes no notice of such alterations, the presumption is, that they were made after the date of the codicil.¹²

§ 66. A later will revoked will not prevent an earlier and inconsistent one, not revoked by burning, tearing, cancelling or obliterating from remaining in force;¹³ and this will be so whether the later will contained an express clause of revocation or not.¹⁴ The reason is this; the will does not become operative before the testator's death. However, it was held in *Colvin v. Warford*, 20 Md. 357, that an express clause of revocation in a will operates to supersede the will thus revoked, but that it will be again restored by the destruction of the revoking will.

§ 67. When the will was executed in duplicate, both copies being in the testator's custody, and one of them was found mutilated, and the other preserved, it was held the will remained unrevoked.¹⁵

§ 68. The statutory word "tearing" has been held to include cutting.¹⁶ Cutting out a part, as the name of a legatee, is deemed a revocation to that extent.¹⁷ And cutting out or obliterating the principal part, as the signature of the testator, or of the witnesses, will be a revocation of the whole will.¹⁸

§ 69. Where one had executed his will, as a sealed instrument, and tore off the seal with intent to revoke, it was held a sufficient revocation, notwithstanding the statute did not require a seal.¹⁹

upon the validity of any part of the instrument, as well as the whole. And in *re John Williams' Will*, 5 Leg. News, 112, Bradwell, Co. Judge, said, the county court has full power to examine any paper offered for probate as a will, and to probate such portions thereof as the evidence shall show to be the will of the deceased, and to reject such portions as shall appear not to be his will.

¹² *Rowley v. Merlen*, 6 Jur. N. S. 1165.

¹³ *Goodright v. Glazier*, 4 Burrow, 2512; 4 Kent, 531, also note (e.) *Ib*.

¹⁴ *Harwood v. Goodright*, 1 Cowp. 87, 92. But see 1 Redf. Wills, § 25, pl. 36 and notes; *ib.* § 29, pl. 16, 17, 18.

¹⁵ *Roberts v. Round*, 3 Hagg. 588.

¹⁶ *Hobbs v. Knight*, 1 Curteis, 289.

¹⁷ *Re Cooke*, 5 Notes Cas. 390; *Re Lambert*, 1 Notes Cas. 131.

¹⁸ 1 Jarman, 161, and n. 1, 132; *Re Simpson*, 5 Jur. N. S. 179.

¹⁹ *Price v. Powell*, 3 H. & Nov. 341.

§ 70. Act and intention must concur. Mere tearing or otherwise destroying one's will, by accident, and without any intention of revocation, will not have any legal effect, and this may always be shown by extrinsic evidence, as that it is the effect of wear only.²⁰

§ 71. To cancel a paper means, to cross the written lines, and deface them, or blot out or obliterate them.

§ 72. Soundness of mind and memory is as necessary to the valid revocation of a will, as to its execution. Therefore the mere fact of tearing, cancelling, obliterating, burning, etc., without the intent to revoke which the statute makes indispensable to the revocation, and which could not exist, unless the testator were in his sane mind, could have no legal operation upon the instrument.²¹ And a will or codicil executed under undue influence will not revoke a former will.²²

§ 73. When a will is once known to exist, and was last heard of in the custody of the testator, and cannot be found after his decease, the presumption is that it was destroyed by the testator, with intention to revoke.²³ But where it was shown that before the testator's death the will was gone from the trunk, where it was usually kept by him, but it appeared that this was not by the act of the testator, it was held, that the will might be admitted to probate, notwithstanding the prima facie presumption of its revocation.²⁴ So if the will was deposited in the hands of the scrivener, and cannot be found after the testator's death, and the depository is ignorant of the mode of its abstraction or disappearance, the presumption is in favor of its remaining in force until the time of the testator's decease.²⁵

§ 74. Where a will is found mutilated after the decease of

²⁰ 1 Redf. Wills, § 25, pl. 21.

²¹ *Idley v. Brown*, 11 Wend. 227; *Smith v. Smith*, 4 Barb. 28; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Rhodes v. Vinton*, 9 Gill, 169; *Ford v. Ford*, 7 Humph. 92.

²² *O'Neill v. Farr*, 1 Rich. 80; also 1 Redf. Wills, § 28, pl. 9; ante, § 61.

²³ *Holland v. Ferris*, 2 Bradf. Sur. 334.

²⁴ *Minkler v. Minkler*, 14 Vt. 128.

²⁵ *Hildreth v. Shillinger*, 2 Stark. 196.

the testator, and had last been in his custody, this is prima facie evidence that it was done by the testator with intent to revoke.²⁶

§ 75. At common law a will operated on such real estate only as the testator had at the time of its execution.²⁷ After acquired estate did not pass under it. And where the form of the interest in the estate possessed at the date of the will had afterward materially changed, such change in the estate was deemed a revocation of the will.²⁸ But the first section of the statute gives the right to devise the estate, etc. which the testator has, or at the time of his death, shall have. The will takes effect at the testator's death, and upon such property as he may then have. Therefore a material change of the estate does not operate to revoke the will, but the alienation of a material portion which was devised, operates as a revocation to that extent, but no farther.²⁹

§ 76. A valid agreement or covenant to convey, which a court of chancery will specifically enforce, will operate in equity as a revocation of a former devise of the same estate. This rule is maintained in equity, upon the ground that, from the date of the contract, the estate is regarded as the real estate of the vendee, as if the same had been conveyed.³⁰ And where the testator devised certain portions of his real estate to his several children, and among others to his two daughters, and gave the residue of his estate to be equally divided among all of his children, and subsequently sold and conveyed a portion of that devised to his daughters, taking back a bond and mortgage to secure the purchase money, it was held to have revoked the devise to his daughters, as to the portion so sold, and that

²⁶ *Evans v. Dallow*, 21 L. J. Prob. 128.

²⁷ 1 Jarman, 136.

²⁸ 3 P. Wms. 163.

²⁹ 1 Redf. Wills, § 26, pl. 12, 13.

³⁰ 4 Kent, 528. And it is said, that where the testator conveys the estate, and it reverts back again, by the same instrument, or otherwise, it will operate to revoke a prior devise of the same. *Walton v. Walton*, 7 Johns. Ch. 258. But, *quære*, can this be so if the reversion takes place prior to the testator's death ?

the securities became by the transaction, a portion of the residuum of the estate, to be divided equally among all the children, under the residuary clause in the will.³¹ And a lease for ninety-nine years, with the right in the lessee to extinguish the reversion by the payment of a fixed sum, will revoke a devise of the same estate.³²

§ 78. The sale and conveyance of so large a portion of the real estate devised, as to render it impracticable to give effect to the dispositions of the will, operates as a revocation of the will.³³ So a grant in fee of the estate devised, reserving rent with a clause of re-entry, operates to revoke the devise.³⁴

§ 79. The questions whether a will is revoked by a subsequent one, or by a codicil, and to what extent, are sometimes very difficult to satisfactorily answer. Of course they cannot arise upon any but legally executed wills and codicils. Nor can they arise where a later will expressly revokes a former one, but only where the provisions of one are inconsistent with those of the other; as, if the language of the supposed revocation admits of a doubt whether a revocation was intended, or of the extent of the revocation.

§ 80. Where the two wills are inconsistent with each other, the provisions of the later one will prevail; as, where the later will disposes of all the testator's estate to other legatees than those named in the first, or to the same ones in different proportions. This amounts to a total revocation.³⁵ But where the provisions of one will are inconsistent with only a portion of those of the other the provisions of the earlier one, the latter

³¹ *Adams v. Winne*, 7 Paige, 97; *Beck v. McGilles*, 9 Barb. 35; *McNaughton v. McNaughton*, 34 N. Y. 201. But see *Stubbs v. Houston*, 33 Ala. 555.

³² *Bosley v. Bosley*, 14 How. (U. S.) 390.

³³ *In re Cooper's Estate*, 4 Barr. 88. And it is said the mortgage of a portion of the estate will operate to revoke a devise of the same, to that extent, as well as an absolute conveyance. *M'Taggart v. Thompson*, 14 Penn. St. 149. But this is at least doubtful. See post, Chap. XLII.

³⁴ *Harrington v. Budd*, 4 Denio, 321.

³⁵ *Evans v. Evans*, 27 Sim. 107; *In re Fisher*, 4 Wis. 254; *Simons v. Simons*, 26 Barb. 68.

will be made to yield only so far as it is found impossible to make them stand with the provisions of the later one.³⁶ A devise will not be held revoked further than is absolutely necessary, by a subsequent inconsistent devise, nor unless, or until, the subsequent devise can take effect.³⁷

§ 81. The effect of the revocation of a particular legacy, where there is no disposition made of the same, either generally or specifically, is that of intestacy to that extent.³⁸ And the subject matter becomes residuary estate.

CHAPTER VI.

CONSTRUCTION OF WILLS.

§ 82. General principles.

83. Rules of construction by Mr. Jarman.
84. Other and further rules adopted by American courts.
85. Concerning words of equivocal meaning.
86. Clearly expressed intention prevails over doubtful constructions.
87. Existing punctuation may be disregarded.
88. Courts give effect to all the words, in general.
89. All the papers constituting the testamentary act are to be taken together.
90. The construction of foreign wills is governed by the law of the place where the property is situated.
91. Concerning transposition of words.
- 92-96. Concerning change of words.
97. Repugnant provisions — The latest must prevail. Instances of apparently repugnant provisions reconciled.
98. Repugnant words sometimes rejected or transposed.
99. Words may be supplied by intendment in certain cases.
100. Instances of supplying words.

³⁶ Jarman, 161; *Plenty v. West*, 6 C. B. 201; 1 Rob. 264; *Cookson v. Hancock*, 1 Keen, 8, 17; and see 1 Redf. Wills, § 28, pl. 34, and note.

³⁷ *Duffield v. Duffield*, 3 Bligh, N. S. 200; 1 D & Cl. 268, 395; *Re Colthead*, 2 DeG. & J. 690.

³⁸ *Ramsey v. Shelmerdine*, Law Rep. 1 Eq. 120.

§ 82. The rules for the construction of wills are less rigid than those applied to ordinary legal instruments. The testator has a legal right to dispose of his property as he sees fit. No one has any right to it during his life, nor even at his decease, except subject to his wishes, if he sees fit to dispose of it by will. He may therefore exclude his nearest relation, and give it all to strangers. But if he fails to make a will, the law steps in and disposes of his estate to those persons whom it may reasonably be supposed he would have given it to had he attempted its distribution. Therefore in interpreting wills the true aim must be to ascertain the testator's intent, and give effect to that. But the intention to be sought must be that which the testator has expressed in his will; and this must be judged of, exclusively, by the words of the instrument, as applied to the subject matter, and the surrounding circumstances.¹

§ 83. Mr. Jarman, in his valuable work,² has extracted from the vast number of cases involving the construction of wills, a series of general rules, which will perhaps be found to be the best statement of the principles of testamentary construction to be met with in the books. They are here given without his citations of authorities, but with some references contained in brackets to American cases and to later English cases. They are as follows:

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England. [In other words, according to the law of the place where the real estate is situated.] But a will of personality is governed by the *lex domicilii*. [*Ennis v. Smith*, 14 How. (U.S.) 400; *Harrison v. Nixon*, 9 Pet. (U.S.) 483.]

II. That technical words are not very necessary to give effect to any species of disposition in a will.

III. That the construction of a will is the same at law and

¹ *Chrystie v. Phyfe*, 19 N. Y. 234, 348; *Arcularius v. Geisenhainer*, 3 Bradf. Sur. 64; *Jackson v. Laquere*, 5 Cow. 221.

² *Wills*, Vol. 2, p. 732; See 4 Kent's Com. pp. 326, 534, and the learned and valuable notes to the same.

in equity ; the jurisdiction of each being governed by the nature of the subject ; though the consequences may differ ; as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. That a will speaks for some purposes, from the period of execution, and for others from the death of the testator ; but never operates until the latter period.

V. That the heir is not to be disinherited without an express devise, or necessary implication ; such implication importing not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed.

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be a definite gift to some other definite object.

VII. That all parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole. [*Smith v. Taylor*, 21 Ill. 298. And every part of the instrument must have its just operation unless there arises some invincible repugnance, or else some portion is absolutely unintelligible. *Norris v. Beyea*, 13 N. Y. 273, 283.] But where several parts are absolutely irreconcilable, the latter must prevail.

VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will ; though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity (arising from words equally descriptive of two or more subjects or objects of gift).

IX. Nor to vary the meaning of words ; and therefore to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible.

X. But courts will look at the circumstances under which the deviser makes his will ; as the state of his property, of his family, and the like.

XI. That in general, implication is admissible only in the absence of, and not to control, an express disposition.

XII. That an express and positive devise cannot be con-

trolled by the reason assigned, or by ambiguous words; or by inference and argument from other parts of the will; and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents, though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt.

XIII. That the inconvenience, or absurdity of a devise, is no ground for varying the construction, where the terms of it are unambiguous [*Butler v. Butler*, 3 Barb. Ch. 304]; nor is the fact that the testator did not foresee all the consequences of his disposition, a reason for varying it. But where the intention is obscured, by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent, purpose.

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void.

XV. That favor, or disfavor, to the object, ought not to influence the construction.

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained [*Cromer v. Pinckney*, 3 Barb. Ch. 466]; and they are in all cases to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of the two modes of construction, that is to be preferred which will prevent a total intestacy. [*Chrystie v. Phye*, 19 N. Y. 344.]

XVII. That where a testator uses technical words, he is presumed to employ them in their technical sense, unless the context clearly indicates the contrary. [*Rawson v. Rawson*, 52 Ill. 62. But this rule may be considered somewhat modified by late English cases. In *Young v. Robertson*, 4 Macq. H. L.

Cas. 314, 325, the rule is thus stated. The primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural, ordinary meaning, which it has in the vocabulary of ordinary life, and not to give words employed in that vocabulary an artificial, a secondary, and a technical meaning. And in *Hall v. Warren*, 9 H. L. Cas. 420, it was held, that in construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out.]

XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject. And on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning.

XIX. That words and limitations may be transposed, where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. [Words, or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator. *Pond v. Bergh*, 10 Paige, 140. But it must appear either from the words of the will, or extrinsic proof, admissible in aid of the construction of the words, that the transposition does really bring out the true intent of the testator, and thus render clear what was before obscure. *Ex parte Hornby*, 2 Bradf. Sur. 420; *Rathbun v. Dyckman*, 3 Paige, 9. For if the transposition leaves the same uncertainty, only giving a different import, it is not allowable. But where it gives effect to all provisions of the will, and renders them all harmonious and consistent, both with each other, and with the general purpose and intent of the will, it affords very satisfactory ground of presumption, that it reaches the source of the difficulty, and explains the mode in which it arose. *Hyatt v. Pugsley*, 23 Barb. 285; *Simpson v. Smith*, 1 Sneed, 394.]

XX. That words which it is obvious are miswritten, (as dying with issue, for dying without issue), may be corrected.

XXI. That the construction is not to be varied by events, subsequent to the execution; but the courts in determining the meaning of particular expressions, will look to possible circumstances, in which they might have been called to affix a signification to them.

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other circumstances, that the testator had the same intention. There must be an apparent design to connect them. This, and the former class of cases, chiefly relate to a question of frequent occurrence; whether words of limitation, preceded by several devises, relate to more than one of those devises.

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and accordingly, a provision for the death of devisees, will not be considered as intended to provide exclusively for lapse, if it admits of any other construction.

§ 84. Whilst the foregoing rules embrace principles applicable to nearly every case that would be likely to occur, there are some decisions of American courts which declare other useful principles of interpretation. Accordingly we present such of them as seem most important.

§ 85. When words are equivocal, that meaning must be adopted which will tend to preserve consistency, in preference to one which would create inconsistency.³ Where the general intent of the testator is clear, and it is impracticable to give effect to all of the language of the instrument, expressive of some particular, or special intent, the latter must yield to the former. But every expressed intent of the testator must be carried out

³ *Chrystie v. Phyfe*, 19 N. Y. 344; *Hone v. Van Schaick*, 3 N. Y. 538.

where it can be.⁴ And the general intent overrides all mere technical and grammatical rules of construction.⁵ But the court cannot remodel the will in order to meet a contingency not in the mind of the testator.⁶

§ 86. A clearly expressed intention, in one portion of the will, is not to yield to a doubtful construction, in any other portion of the instrument.⁷

§ 87. The existing punctuation will be disregarded, if any change in that respect will tend to bring out and render the meaning of the instrument more obvious and more unquestionable.⁸

§ 88. It is the duty of the court to give effect to all of the words without rejecting or controlling any of them, if it can be done by a reasonable construction, not inconsistent with the manifest intent of the testator.⁹

§ 89. All the papers which constitute the testamentary act are to be taken together; as the will and codicils, and any papers so referred to as to be incorporated with the same.¹⁰

§ 90. In regard to foreign wills of real estate, the authorities are clear, that their construction is governed entirely by the law of the place where the property is situated.¹¹ But the words of a will of personalty are to be construed with reference to the law of the domicile of the testator, unless there is some evidence of a different intention. Therefore where one born and domiciled in England made his will, giving his personal estate to his heir-at-law, it was held to import the heir-at-law according to the definition of the English law.¹²

§ 91. Where a clause in a will is not sensible, or is absurd,

⁴ *Parks v. Parks*, 9 Paige, 107.

⁵ *Sorsby v. Vance*, 36 Miss. 564.

⁶ *Lepage v. McNamara*, 5 Clarke, Iowa, 124; *Stokes v. Tilly*, 1 Stockt. 130.

⁷ *Corrigan v. Kiernan*, 1 Bradf. Sur. 208; *Brown v. Lyon*, 6 N. Y. 419.

⁸ *Arcularius v. Geisenhainer*, 3 Bradf. Sur. 64.

⁹ *Dawes v. Swan*, 4 Mass. 208, 215; *Cook v. Holmes*, 11 Mass. 528.

¹⁰ *Westcott v. Cady*, 5 Johns. Ch. 343; *Leavens v. Butler*, 8 Post, 380.

¹¹ 1 Redf. Wills, § 30a, pl. 8.

¹² *Harrison v. Nixon*, 9 Pet. (U. S.) 483; *Ennis v. Smith*, 14 How. (U. S.) 400; 1 Redf. § 30a, pl. 9.

and can be rendered sensible, and consistent with the general tenor of the will, and with the extraneous circumstances, by transposition, it is generally allowable;¹³ as, where the testator misdescribes his estates, as being in different localities from the fact, putting one estate in the locality of another, and vice versa; it was held, that where sufficient appeared upon the face of the will, when applied to the subject matter, to show that such misdescription was a mere mistake, either in the testator or the person who wrote the will, that it would not have the effect to defeat the obvious intention of the testator.¹⁴

§ 92. It sometimes occurs that the testator has used a wrong word by mistake, and this is so apparent from the face of the will, and the will itself is so irrational by reason of the use of such word, when considered with reference to extrinsic facts, that there is no ground for difference of opinion or argument by way of construction: in such cases a change of words is permissible. But no word in a will can be rejected and another substituted in its place, without the clearest evidence that such change would effectuate the real intention of the testator.¹⁵ Therefore where the testator's intention evidently appeared to be, to divide his property equally among his seven children, and for that purpose he had arranged it upon seven schedules, and subjected it to mortgage debts in such manner, that if in a particular clause the words "fourth schedule" were read literally, the entire plan of the will would be frustrated, and the payment of the debt in the manner provided would become impossible, but if "fourth" were read "fifth," the whole would be rendered consistent and rational, the court did not hesitate to adopt that construction.¹⁶

§ 93. Slight changes in the words or their collocation, are

¹³ *East v. Cook*, 2 Ves. Sen. 30, 32; *Duke of Marlborough v. Godolphin* Ib. 74.

¹⁴ *Mosley v. Massey*, 8 East. 149.

¹⁵ *O'Brien v. Herney*, 2 Edw. Ch. 242; *Hawn v. Banks*, 4 Edw. Ch. 664; *VanVechten v. Pearson*, 5 Paige, 512; *Hunt v. Hunt*, 11 Met. 88; *Carpenter v. Heard*, 14 Pick. 449.

¹⁶ *Hart v. Tulk*, 2 De. 9 M. & G. 300.

quite frequent in the construction of wills, since very few persons use language with much precision, and even the most correct writers sometimes use familiar forms of expression, with great looseness.¹⁷ The most common illustration of this occurs, probably in the use of the words, "and," "or," and similar expressions. It is very common to give conjunctive words a disjunctive force, and vice versa.

§ 94. It is now a settled rule, that where an estate, in lands is limited to one, and if he dies before attaining twenty-one years, or without issue, both events must concur, in order to pass the estate over, otherwise, upon the happening of either event, the estate becomes absolute in him.¹⁸ And the same rule of construction extends to devises of personalty; as where the testator bequeathed a sum of money to A., if he attained the age of twenty-one, but if he should not attain that age, or die without leaving issue male, then over, it was held that the estate vested absolutely in A. upon his attaining the age of majority.¹⁹ In these instances "or" is read as "and." And where the estate is made to depend upon the devisee dying during the lifetime of another, *or* under twenty-one, and without leaving issue, the word "or" must be read "and."²⁰

§ 95. There is a class of cases where the word "and" is used disjunctively by the repetition of the verb. Thus a devise to the testator's two sons, and in case both the sons should die unmarried, and neither of them should have any issue legally begotten, then over; it was held to imply, that if one of the sons died unmarried, and the other without issue, the estate over would vest.²¹

§ 96. The expression "reviving son" has been construed as "surviving son," where such was the evident intention.²² "Her"

¹⁷ Woodstock v. Shillito, 6 Sim. 416. Joint terms, as it was claimed, were here construed as several.

¹⁸ 1 Jarman, 472; Robertson v. Johnston, 24 Ga. 102; Kelso v. Dickey, 7 W. & S. 279; May v. Enslin, 2 Mass. 554.

¹⁹ Mytton v. Boodle, 6 Sim. 457.

²⁰ Miles v. Dyer, 5 Sim. 435.

²¹ Wilson v. Bayly, 3 Br. P. C. Toml. 195.

²² Pond v. Bergh, 10 Paige, 140.

was construed "their," in another case.²² So "heirs" has been read "children,"²⁴ and "children" has been held equivalent to "issue;"²⁶ and "children" has been held also to include "grand-children."²⁸

§ 97. The general rule in regard to repugnancy is, that where there is no fair and reasonable mode of reconciliation, the latest of the contradictory provisions shall prevail. But we have seen that courts will, if possible, adopt such construction as will uphold all the provisions of a will. And in carrying this purpose into effect, it is permissible to resort to any reasonable intendment. Therefore, where the testator has given the same estate to two or more persons in different portions of his will, it must be treated the same as if all the names had been united in one gift, of the same estate.²⁷ And, if necessary, the relative order of devises or bequests will be reversed, as where an estate is first given in fee to A., and then for life to B.²⁸ And it has been held that, where the testator makes a general devise or bequest, which would include the whole of his estate, and in other portions of his will makes specific dispositions, these will be regarded as explanations or exceptions, out of the general disposition; and it is not important in such case, whether the general or the special provisions come first in order, since, in either case, the general disposition will be regarded as made subject to the more specific ones.²⁹

§ 98. Repugnant words in a will, in whatever portion of the instrument they appear, and which contravene the evident general purpose and intention of the testator, in the other provisions of the will, may be rejected or transposed.³⁰ But words

²² *Keith v. Perry*, 1 Desaus. 353.

²⁴ *Bowers v. Porter*, 4 Pick. 198; *Ellis v. Essex Merrimac Bridge*, 2 Pick. 243.

²⁵ *Merryman v. Merryman*, 5 Munf. 440.

²⁶ *Osgood v. Lovering*, 33 Me. 404.

²⁷ 1 Redf. Wills, § 32, pl. 1, 2.

²⁸ *Cro. Eliz.* 9; *Ridout v. Dowding*, 1 Atk. 419; *Plenty v. West*, 6 C. B. 201.

²⁹ *Wallop v. Darby*, Yelv. 209; *Cuthbert v. Lempriere*, M. & S. 158.

³⁰ 1 Redf. Wills, § 32, pl. 7; *Halliday v. Dixon*, 27 Ill. 33; *Doed v. Stenlake*, 12 East. 515.

must not be rejected as repugnant, unless it becomes impossible to give them any reasonable application to the subject matter, and then only when it becomes obvious from the context, taking in the entire scope of the will, that such result comes nearest the testator's intention ; and where there seems an invincible repugnancy, and it is impossible to determine which clause the testator did intend to prevail, other things being precisely equal, the latter clause must prevail over an earlier one.³¹

§ 99. It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended, and supposed he had done, and the defect is produced by the omission of some word or words ; and where it is certain, beyond reasonable doubt, what particular words were thus omitted, they may be supplied by intendment, and the will read and construed, as if those words had been written in the place, or places, where they were intended to have been. But no word can be thus supplied, if there is any fair ground to question what particular words were intended to have been used which were not. By this however is meant, that so long as different persons may be supposed to entertain different opinions, in regard to the particular words intended to have been used, or, at least, as to the import of those words, the will must be read as it appears, and the meaning extracted, as it best can be, from what is written. But the fact, that different persons may entertain different opinions, in regard to which of two or more words of nearly the same import, was omitted in the will, forms no objection to supplying the omission.³²

§ 100. The cases are numerous where words have been supplied or changed ; as, "Die without issue," is often read "Die without leaving issue," or "without issue living."³³ So, "or" is often read as "and," and *vice versa*.

³¹ *Morral v. Sutton*, 4 Beav. 478 ; 1 Redf. Wills, § 32, pl. 13 to 19 inclusive, and cases cited.

³² Redf. Wills, § 33, pl. 1, 2, and notes ; 1 Jarman, 456.

³³ *Mosby v. Corbin*, 3 A. K. Mar. 289 ; *Holms v. Williams*, 1 Root, 332 ; *McKeehan v. Wilson*, 53 Penn. St. 74.

CHAPTER VII.

REMEDY WHERE THERE IS A REASONABLE DOUBT OF THE PROPER CONSTRUCTION.

- § 101. If executor has doubts of the proper construction, he may proceed in chancery.
- 102. Costs of proceeding are to be paid by the estate.
 - 103. General rules of evidence in regard to contracts govern these cases.
 - 104. Parol evidence not admissible to vary or contradict the will, or to supply an omission, but may be used to explain a latent ambiguity.
 - 105. Concerning the power of courts of equity to correct mistakes in a will.
 - 106. Chancellor Kent, quoted.
 - 107. Sir James Wigram's seven propositions.
 - 108. Evidence of testator's declarations as affecting construction.
 - 109. Points settled in reference to the testator's declarations.
 - 110. Extrinsic evidence including the testator's declarations as to his intention to release a debt.
 - 110a. By statute the appointment of a debtor for executor does not release the debt, with certain exceptions.
 - 111. Concerning the rights of a creditor who is a legatee.
 - 112. Declaration of the testator in case of latent ambiguity.
 - 113. His declarations concerning acts of revocation.
 - 114. Where will is contested on the ground of fraud, etc., his declarations admissible for some purposes.
 - 115-118. Cases in illustration.
 - 119. Concerning proof of the testator's intention in case of ambiguity.
 - 120. Cases not strictly of latent ambiguity stated, and where extrinsic evidence is necessary to point out the person or thing intended.
 - 121. A complete blank in the name of the legatee cannot be supplied. Not so if a part of the name is omitted.
 - 122. If name answers to any person known to testator, courts will not admit evidence showing it was intended for another.
 - 123. Extrinsic evidence not admissible in favor of one to whom no part of the description applies.
 - 124. Situation, etc., of testator to be taken into account, as well as other provisions of the will in constructing each part of it.

§ 101. Where an executor holds real or personal estate under any trust created by a will, and doubts arise in regard to the true construction of such will, and there are different claim-

ants, he may proceed by bill in chancery, setting forth the facts, and calling upon the claimants to settle their rights before the court, and praying the order of the court, in regard to the mode of executing the trust.¹ But the suit may be brought by any party, claiming an interest under the will, against the executor, and all parties interested in the question.²

These bills are denominated in Story's Equity Jurisprudence, "bills in the nature of bills of interpleader."

§ 102. The costs in these cases are generally chargeable against the general assets of the testator.³

§ 103. The rules for the admission and exclusion of parol evidence in regard to wills, are essentially the same which prevail in regard to contracts generally. Therefore it cannot be received to show the intention of the testator, except by enabling the court, where the question arises, to give his language such an interpretation, as is reasonable to presume, from the circumstances in which he was placed, he intended it should receive; or to put the court in the place of the testator. The inconvenience and uncertainty which would result from wills partly in writing and partly in parol, whereby parties could never be certain what their rights were until settled by expensive and tedious litigation, are sufficient reasons for the rule.

§ 104. The testimony of the scrivener is not admissible to show what directions were given him by the testator in regard to drawing the will,⁴ except in case of latent ambiguity.⁵ And evidence of statements made by the testator at the time he executed the will, must be rejected, except in the case of a latent ambiguity, or to rebut a resulting trust.⁶ And parol evidence is not admissible to supply any omission or defect in a will,

¹ *Treadwell v. Cordis*, 5 Gray, 341; *Dimmock v. Bixby*, 20 Pick. 368; *Hooper v. Hooper*, 9 Cush. 127.

² *Bowers v. Smith*, 10 Paige, 193.

³ See 1 Redf. Wills, § 36, pl. 4 and notes.

⁴ *Brown v. Selwyn*, Cas. temp. Talbot, 240.

⁵ *M'Allister v. Tate*, 11 Rich. Law, 509.

⁶ *McClure v. Evans*, 29 Beav. 422; *Mann v. Mann*, 1 Johns. Ch. 231, S. C. 14 Johns. 1.

which may have occurred through mistake or inadvertence.⁷ Nor is parol evidence admissible to show that the testator intended to devise land situated in different sections from those named in the will, and that the draughtsman of the will by mistake inserted the wrong description. In such case the words of the description being unambiguous, and the thing devised certain and specific, no extrinsic evidence is required to identify the thing intended, nor admissible to show that a different thing was intended.⁸

§ 105. Courts of equity hold themselves competent to correct any mistake which is apparent on the face of the will, or which can be made out by fair and reasonable construction from the other parts of the will, in connection with, and as expounded by, other circumstances.⁹ But the fact of a mistake being made, and its precise character and extent, must clearly appear upon the face of the will itself, or from fair and obvious legal construction, aided by such facts and circumstances as are admissible for that purpose.¹⁰

§ 106. Chancellor *Kent*¹¹ declares it a well settled rule, that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: 1. Where there is a latent ambiguity, arising de hors the will, as to the person or subject-matter meant to be described; and 2, to rebut a resulting trust. All the cases profess to go upon one of these grounds.

§ 107. And Sir James Wigram, treating of the law respecting the admission of extrinsic evidence in aid of the interpretation of wills, has divided the subject into seven propositions, as follows:

"I. A testator is always presumed to use the words in which

⁷ *Newburg v. Newburg*, 5 Mad. 364; *Stanley v. Stanley*, 2 Johns. & H. 491.

⁸ *Kurtz v. Hibner*, 55 Ill. 514.

⁹ *Mellish v. Mellish*, 4 Ves. 45; *Phillips v. Chamberlain*, 4 Ves. 51.

¹⁰ *Story*, Eq. Jur. § 181. See post, § 127-131.

¹¹ *Mann v. Mann*, 1 Johns. Ch. 231; *Kurtz v. Hibner*, 55 Ill. 514.

he expresses himself, according to their strict and primary acceptance, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

“II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

“III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

“IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the meaning of the words.

“V. For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the

testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

"VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see next proposition) will be void for uncertainty.

"VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intention, to make certain the person or thing intended, where the description in the will is insufficient for that purpose. These cases may be thus defined: Where the object of a testator's bounty, or the subject of disposition (i. e., the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

§ 108. Evidence of the testators' declarations has been received in order to affect the validity, operation and construction of wills, and the reports abound with cases showing both its admission and its refusal for these purposes.¹²

§ 109. The following points however appear to be settled by a preponderance of authority :

No declaration of the testator, whether made before, contemporaneously with, or subsequent to, the making of the will, can be received to affect its construction.¹³

¹² Perhaps Cowen & Hill's Notes to Phil. Ev. 646, et. seq., where the cases pro and con are collected, contains as full and satisfactory a discussion of this question as can be found anywhere.

¹³ Farrar v. Ayres, 5 Pick. 404; Barrett v. Wright, 13 Pick. 45; Bradley

§ 110. But courts of chancery admit extrinsic evidence to show the testator's intent in some cases in giving a legacy; and hence his acts and declarations may be shown for the purpose; as in cases where a legacy is given to his debtor, and the will either takes no notice of the debt, or leaves the testator's intention doubtful, extrinsic evidence may be admitted to show whether he intended to release the debt.¹⁴ Generally a legacy is taken as a gift. But where it is given to a creditor, and is equal to, or greater in amount than an existing debt, where it is of the same nature, is certain and not contingent, and no particular motive is assigned for the gift; in all such cases the legacy is deemed, or as some authors state it, presumed, to be a satisfaction of the debt.¹⁵ But, as Mr. Redfield remarks,¹⁶ the rule has not been looked upon with much favor, and all conceivable exceptions to it have been allowed, and the declarations of the testator in regard to his intentions have been constantly received to rebut the presumption.¹⁷

§ 110 *a*. By the statute, title Wills, § 19, it is provided that, in no case where the testator shall, by his will, appoint his debtor to be his executor, shall such appointment operate as a release or extinguishment of any debt due from such executor to the testator, unless the testator shall, in such will, expressly declare his intention to bequeath or release such debt;

v. Bradley, 24 Mo. 311; *Avery v. Chapel*, 6 Conn. 270. But as to whether and when the presumption that two legacies given to the same person for the same amount, and for the same expressed reason, are cumulative, can be contradicted, see *Gresley's Eq. Ev.* 294-297.

¹⁴ 1 Story Eq. Jur. § 1123; 3 Greenl. Ev. § 366; 1 Redf. Wills, § 39 pl. 3.

¹⁵ 2 Story Eq. Jur. § 1119-23. But this rule never having rested upon any very satisfactory foundation, has been so much shaken by eminent American authorities, that it can scarcely be said with propriety to exist. The court express no opinion upon it, though it was alluded to in *Maloney v. Scanlan*, 53 Ill. 122. In *Clark v. Bogardus*, 12 Wend. 67, the court say, that exceptions to the rule are so numerous that the rule should be stated differently: to-wit, that a legacy shall not be deemed a satisfaction of a pre-existing debt of the testator, unless it appears to have been his intention that it should so operate. *Williams v. Cary*, 4 Wend. 443.

¹⁶ Wills, Vol. 1, § 39, pl. 3.

¹⁷ 53 Ill. 122.

nor even in that case, unless the estate of the testator is sufficient to discharge the whole of his just debts, over and above the debt due from the executor.

§ 111. In the case of *Maloney v. Scanlan*, it was held that a creditor has a right to have his debt allowed against the estate, to be paid in due course of administration with other debts in the same degree, and this right cannot be defeated by a legacy which has not been and may never be paid. But when the debt has been allowed and paid, and he demands from the executor his legacy, the latter can raise the question whether it was intended by the testator as a gift, or merely as a satisfaction of such debt.

§ 112. Declarations of the testator made before or after the execution of the will, are admissible, and are the most satisfactory proof, in regard to latent ambiguities. Where the words of a will apply with equal propriety, or with legal certainty, to two or more subjects, or objects, the decision must be made by determining which was in the mind of the testator at the time he used the terms in question.¹⁸ For this purpose evidence was admitted as to which the testator intended, where he used the name of John Cluer, there being father and son of that name.¹⁹ If the words do not apply with equal propriety to more than one subject or object, there is no latent ambiguity, and no occasion for extrinsic evidence exists.²⁰

§ 113. Declarations of the testator accompanying an act of revocation named in the statute, which is equivocal in its character, such as slightly burning, tearing or obliterating the will, may be given in evidence, for the purpose of showing the intent with which the act was done.²¹

§ 114. When a will is contested on the ground of fraud or

¹⁸ *Doe d. v. Allen*, 12 Ad. & Ellis, 451. See 1 Redf. Wills, § 40, notes 2 and 3.

¹⁹ *Jones v. Newman*, 1 W. Bl. 60. The books are full of cases supporting the text.

²⁰ *Doe d. v. Westlake*, 4 B. & Ald. 57.

²¹ *Waterman v. Whitney*, 5 N. Y. 157, and cases cited. *Doe d. v. Perkes*, 3 B. & Ald. 489.

undue influence, the testator's declarations are competent evidence for some purposes.

§ 115. When the issue involves no question of the testator's mental capacity his declarations are not admissible. They cannot be received, therefore, to show the distinct external facts, either of fraud or undue influence. For these purposes they are considered as but hearsay evidence.²² But there is a very respectable array of authorities against this doctrine.²³

§ 116. But the testator's declarations, made at the time or after executing the will, stating the contents of the same correctly, are admissible to show his knowledge of such contents at the time the will was executed; as, in case of a blind person.²⁴ So letters written by a testator before the will was made, are competent for the same purpose.²⁵

§ 117. The testator's declarations may be given in evidence when made before, or at, or after, but near, the time of making the will, to show the condition of his mind; as, that it was so enfeebled when the will was made, as to be incapable of resisting the importunities or influences which it is claimed were exerted upon him.²⁶ Of course the admissibility and weight of such evidence would depend upon the distance of time, when the declarations were made, from the date of the testamentary act, and the character of the mental defect insisted upon. Senile dementia, approaching by slow degrees, might be shown at some distance of time before and after the testamentary act; but the delirium of drunkenness, or of fever, being of short duration, must be established by acts occurring very near the time of the execution of the will.

²² *Waterman v. Whitney*, 5 N. Y. 157; *Comstock v. Hadlyme*, 8 Conn. 254; *Boylan v. Meeker*, 4 Dutcher, 274.

²³ *Beaubien v. Cicotte*, 12 Mich. 459, cited, § 204. *Roberts v. Trawick*, 17 Ala. 55; *Ib.* 13 Ala. 678; *Means v. Means*, 5 Strobb. 167. *Patton v. Allison*, 7 Humph. 320; *Reel v. Reel*, 1 Hawks, 248. See on this subject an admirable note by Mr. Redfield, *Wills*, Vol. 1, § 9, pl. 6 s. n. 41.

²⁴ *Harleston v. Corbit*, 12 Rich. 604; *Davis v. Rogers*, *Houston*, 44.

²⁵ *McNinch v. Charles*, 2 Rich. 229.

²⁶ *Robinson v. Hutchinson*, 26 Vt. 38; *Waterman v. Whitney*, 5 N. Y. 157; *Comstock v. Hadlyme*, 8 Conn. 254; *Kinne v. Kinne*, 9 Conn. 102.

§ 118. The testator's declarations may be proven though made many years before the execution of the will, and before his mind was enfeebled, to show, by way of establishing an allegation of undue influence, that he intended to exclude particular near relatives, who would, but for the will, have inherited his estate; as, that he had repeatedly declared that none of his property should ever go to the family of his brothers, to whom his will gave it, and by which his three sisters were nearly disinherited;²⁷ or to rebut an allegation of undue influence; as, that the testator had already made provision for his disinherited children, and should give them nothing more; and the former wills in which he had made no provision for them may be given in evidence for the same purpose.²⁸

§ 119. We have already seen that extrinsic evidence may be received in case of latent ambiguity to show the object of the testator's bounty, or the subject of disposition intended by his will; as, in the case of *Reynolds v. Whelan*,²⁹ where the testator gave a legacy to his farming man, W. R., he having two farming men of that name, evidence of the testator's intentions in favor of one of them was received; or, as, in case he should devise his house in the city of R., he having two houses in that city. In both of these cases proof of the testator's declarations as well as other testimony may be received.³⁰

§ 120. There is also a class of cases where the description of the devisee or of the devise is correct in part, and in part incorrect; as, where the name of the devisee is correctly given, but his residence or his relation to the testator, or some other circumstance, descriptive of the person is not accurate; or an estate is described as being in the occupancy of B., when it is in fact in that of A. Cases of this class are sometimes disposed of as matter of construction, or upon the maxim, *falsa demonstratio non nocet*, (a false description does not vitiate.)

²⁷ *Dennison's Appeal*, 29 Conn. 399.

²⁸ *Converse v. Wales*, 4 Allen, 512; *Neel v. Potter*, 40 Penn. St. 433.

²⁹ 16 Law J. Ch. 434.

³⁰ See ante, §§ 111-115.

They are not strictly cases of latent ambiguity,³¹ yet extrinsic evidence must be heard to enable the court to determine if there is a false description and to point out the person or thing meant. And it has been held, that, if a person's name is mistakenly given in a devise, yet if he is so described, that with reference to extrinsic facts, the description clearly identifies him as the person meant, the devise to him is good.³²

§ 121. Where there is a complete blank in the name of the legatee, it cannot be supplied by extrinsic evidence.³³ But where a part only of the name is omitted, as the christian name, it may be supplied.³⁴ When such imperfect descriptions occur, if the parol evidence fails to point out what was intended by the testator, the gift must fail, for uncertainty, as in other cases of latent ambiguity.³⁵

§ 122. But where the name is found to answer to any person known to the testator, courts will not admit evidence to show that it was inserted by mistake for some other name, although some portion of the description used would more strictly apply to the other person than the one named.³⁶

§ 123. It seems to be well settled, that extrinsic evidence cannot, as a general thing, be received to support the claim of one to whom no part of the written description applies.³⁷ And the same rule applies to the description of the subject matter.³⁸

§ 124. The situation and circumstances of the testator as to his property and family, are always to be taken into the account, and also the other provisions of the will, and the reasonableness of the different constructions claimed.³⁹ And extrinsic

³¹ *Miller v. Traverse*, 8 Bing. 244; *Doe d. Le Chevalier v. Huthwaite*, 3 B. & Ald. 632; *Mann v. Mann*, 14 Johns. 1; *Gillett v. Gove*, 18 W. R. 423.

³² *River's Case*, 1 Atk. 410.

³³ *Hunt v. Hart*, 3 B. C. C. 311.

³⁴ *Abbot v. Massie*, 3 Vesey, 148; *Price v. Paige*, 4 Vesey, 679; *Bradshaw v. Thompson*, 2 You. & C. 395.

³⁵ 1 Jarman, 413.

³⁶ *Holmes v. Custance*, 12 Vesey, 279.

³⁷ *Hiscocks v. Hiscocks*, 5 M. & W. 362.

³⁸ *Miller v. Travers*, 8 Bing. 244.

³⁹ *Morton v. Perry*, 1 Met. 446; *Jarvis v. Buttrick*, ib. 480.

evidence may be received in all cases to define the extent of the subject matter intended to be included under general terms; but not to enlarge or vary the extent and meaning of the terms used.⁴⁰

CHAPTER VIII.

MISTAKE—THE POWER OF EQUITY TO CORRECT.

§ 125. Courts may correct mistakes where the intention is apparent on the face of the will.

126. The mistake must be clearly made out.

127. The principle applies to giving and revoking of legacies.

128. The effect of a false reason being given for giving or revoking a legacy.

§ 125. "In regard to mistakes in wills," says Mr. Story,¹ "there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent on the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But then the mistakes must be apparent upon the face of the will, otherwise there can be no relief. * * * It must be a mistake or clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So if there is a mistake in the name, or description, or number of the legatees intended to take; or in the property intended to be bequeathed, equity will correct it.

§ 126. "But in each of these cases the mistake must be clearly made out; for if it is left doubtful, equity will not interfere. So if the words of the bequest are plain, evidence of

⁴⁰ *Spencer v. Higgins*, 22 Conn. 521; *Brown v. Saltonstall*, 3 Met. 423; *Long v. Duval*, 6 B. Mon. 219.

¹ 1 Eq. Jur. §§ 179-183.

a different intention is inadmissible to establish a mistake. Neither will equity rectify a mistake, if it does not appear what the testator would have done in the case, if there had been no mistake.

§ 127. "The same principle applies, where a legacy is revoked, or is given upon a manifest mistake of facts. Thus, if a testator revokes legacies to A. and B., giving as a reason, that they are dead; and they are, in fact, living; equity will hold the revocation invalid, and decree the legacies. So if a woman gives a legacy to a man, describing him as her husband, and in point of fact the marriage is void, he having a former wife then living, the bequest will, in equity, be decreed void. * * But where the testator and the legatee A. G. were married, both knowing at the time, that the legatee had a prior husband alive; and afterwards the testator gave all the residue of his estate to the legatee, describing her as his wife, A. G., it was held, that the legacy was good; for as both parties had a guilty knowledge of the facts, no fraud was committed on the testator.

§ 128. "But a false reason given for a legacy, or for a revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear, that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest."

§ 129. But it is well settled that mere mistakes in the execution of a will, where no fraud is imputable to the parties interested, or their agents, cannot be corrected in a court of equity.² Thus where a statutory requirement does not appear on the face of the will,³ or where the name of the wrong legatee is inserted by mistake of the scrivener.⁴

² Story Eq. Jur. (ed. 1861) § 180 *a*.

³ Nutt v. Nutt, 1 Freem. Ch. (Miss.) 128.

⁴ Yates v. Cole, 1 Jones' Eq. 110; Goode v. Goode, 22 Mo. 518.

CHAPTER IX.

ALTERATION OF THE LAW.—ITS EFFECT ON THE SETTLEMENT OF ESTATES.

§ 130. Changes in the statute of Illinois in relation to administration, descent, distribution and will stated.

131. Effect of changes.

§ 130. The statutes respecting the administration, and the descent and distribution of estates of deceased persons having been materially changed by several acts which took effect July 1, 1872, some questions will naturally arise out of those changes, in regard to proceedings in administration, and to the rights of heirs and distributees.

§ 131. The principle is familiar to every lawyer, that where a change of the statute regulating the mode of proceeding is made during the pendency of a suit, the subsequent proceedings therein must conform to the new statute as nearly as the case will admit. According to this principle, the proceedings in administration begun before July 1, 1872, must thenceforth conform to the provisions of the new statute. But it is also equally well settled that the rights and interests of widows, creditors, heirs, devisees and legatees vest from the moment of the decease.¹ Hence, in determining their rights in the premises, resort must be had to the statute in force at the time of the decease.

¹ Haywood v. Haywood, 20 Pick. 519; Cary v. Taylor, 2 Vern. 302; Kingsbury v. Scovill, 26 Conn. 349; Sturgis v. Ewing, 18 Ill. 176.

CHAPTER X.

OF PROVING AND CONTESTING WILLS.

PART 1. JURISDICTION — LOST WILL — WITNESSES ON AP-
PEAL.

§ 132. Jurisdiction — In what court.

134. In what county to be proven — In what county foreign wills may be probated.

135. Duty of the executor appointed in the will to cause the will to be probated. Penalty for neglect.

136. Persons having possession of will to deliver it to the proper court — Attachment for neglect — Penalty — Altering, destroying or secreting — Penalty.

137. Proof of testator's death.

138. Proof of death — How made. What proof to be made in order to show jurisdiction.

139. Presumption of death from long absence.

140. In what cases proof of the exact date of death important.

141. Proof of death by reputation.

142. Lost will may be proved and admitted to probate.

143. What must be proved in case of a lost will.

144. What search to be made for lost will — Mutilated or destroyed will — Proof as to whether done with intent to revoke.

145. Mental capacity of testator in case of tearing, etc., and lost wills must be proved as in other cases.

146. Duty of court to receive probate and grant letters.

147. Attesting witness to prove execution, which will be sufficient, provided fraud, etc., not shown.

148. Case of *Brownfield v. Brownfield* — What proof of execution sufficient.

149. Testimony admissible to support the will on appeal from the county court.

150. If probate is refused by the county court the testator's sanity may be shown on appeal by the testimony of other than the subscribing witness.

151, 152. Parties interested may contest the validity of wills in the probate court, and examine other than attesting witnesses, to invalidate them.

153. The rules for admission of other evidence stated.

154. Comments on foregoing rules.

§ 132. The Constitution, Art. VI, § 18, provides, that county courts shall have original jurisdiction of all matters of probate, and settlement of the estates of deceased persons.

§ 133. By Laws of 1851, p. 193 (§ 3 Gross' Stat. p. 530, § 33), clerks of county courts are authorized and empowered in vacation to grant letters testamentary and of administration, subject to the approval or disapproval of the court at its next session.

§ 134. The statute, title Wills, § 11, provides, that if any testator shall have a mansion house or known place of residence, his will shall be proved in the county where such mansion house or place of residence shall be. If he has no such place of residence, and lands are devised in his will, the probate shall be in court of the county where the lands lie, or where some of them are situated, if in different counties; and if he has no such known place of residence, and there are no lands devised in his will, the same may be proved either in the county where the testator died or that wherein his estate, or the greater part thereof, shall be. And the first clause of § 10, title Wills, provides that all wills and codicils, which have heretofore been, or shall hereafter be, executed out of this state, may be admitted to probate in any county in this state in which the testator was seized of lands, or other real estate, at the time of his death, in the same manner, and upon like proof as if the same had been executed in this state, whether such will or codicil has first been probated, in the state, territory or country in which it was executed or not.

§ 135. The statute, title Administration, § 2, declares that it shall be the duty of any person knowing that he is appointed as the executor of the will of any person deceased, within thirty days next after the decease of the testator, to cause such will to be proved and recorded in the proper county; or to present the will and declare his refusal to accept of the executorship (see Form No. 5); and every such executor neglecting so to do, without just excuse for such delay, shall forfeit the sum of twenty dollars per month from and after the expiration of said term of thirty days, until he shall cause probate of said will to be made, or present the same as aforesaid, to be recovered by

action of debt, for the use of the estate, by any person who will sue for the same in any court having jurisdiction thereof.¹

§ 136. And section 12 of the statute, title Wills, provides that any person who may have in his possession any will of another, for safe keeping or otherwise, shall, immediately upon the death of the testator, deliver the same to the county court of the proper county; and upon a failure or refusal so to do, the county court may issue an attachment, and compel the production thereof, and the person thus withholding any such will or codicil, shall forfeit and pay twenty dollars per month, from the time the same shall be thus wrongfully withheld, to be recovered by action of debt for the use of the estate, by any person who will sue for the same, in any court having jurisdiction thereof. And if any person to whom a will or codicil shall be delivered by the party making it, for safe custody as aforesaid, shall alter or destroy the same without the direction of the said party (the testator), or shall wilfully secrete it for the space of six months after the death of the testator shall be known to him, the person so offending shall, on conviction thereof, be sentenced to such punishment as is or shall be inflicted by law in cases of larceny.

§ 137. Upon presenting the will to the court for probate, proof must be made, to the satisfaction of the court, of the testator's death. His death alone gives such an instrument conclusive force and operation, and is absolutely essential to give the court jurisdiction of its probate. The proof must show every other fact necessary to give the court jurisdiction.

§ 138. This proof is made in the form of an affidavit, by the executor or other competent witness, stating the time and place of the testator's death, his place of residence, and that he died testate. If he had no place of residence, and his will contains a devise of lands, it states that fact, and in what county they are situated. If he had no place of residence, and no lands are devised in his will, it states in what county he died,

¹ There does not appear to be any time fixed by statute beyond which a will cannot be probated in Illinois. But as to letters of administration, see post, § 236.

or in which his estate or the greater part of it is situated. If the testator died out of the state, it sets forth in what county lands are situated of which he died seized. (See ante, § 134.) These are jurisdictional facts and should be made in some way to appear to the court, before receiving evidence of the execution of the will; and the record of the probate should show that all the facts necessary to give the jurisdiction were made to appear to the satisfaction of the court. (See Form No. 1, also Form of Oath, No. 9.)

§ 139. There are cases in which proof of actual death cannot be made; as, where a person has been absent and not heard from, or of whom no account can be given. In such cases the presumption of life ceases at the end of seven years, from the period when he was last heard from. But no presumption arises in regard to the particular time when death occurred; the party interested in showing the death at any particular time assumes the burden of proof, and may show it by any facts and circumstances satisfactory to the triers.²

§ 140. In ordinary cases the exact time of death is not important. But where a legacy is given to one, and the heir, residuary legatee or devisee questions whether he was not dead at the time of the testator's decease, the exact hour even of death might be of the utmost consequence: for if the legatee died before the testator, the legacy, unless given to a child or grandchild, would lapse,³ in the absence of a special provision for such a contingency, and would go to the heir, residuary legatee or devisee. This however does not concern the mere probate of the will. The fact of the death, or lapse of time from which death may be presumed, is all the court is required to consider, upon the application for that purpose. Its exact date is important in general only when the testator's estate is distributed, and as between the heirs and legatees. But in the case of the Goods of Barrow, before Lord Penzance, it appeared that Charles Barrow died in December, 1840, leaving a will, of

² Whiting v. Nicholl, 46 Ill. 230.

³ Stat. Tit. Descent, § 11.

which his two daughters were executors. His only son, James Barrow, had not been heard of since 1837. His two sisters now applied for administration to him; but the question was, whether they should take the grant as the father's executors, or as their brother's next of kin. Held—Where a man is presumed to be dead, the court does not presume him to be dead before the seven years. Those persons therefore are entitled to his estate who were his next of kin at the time of his death. The sisters are therefore entitled to the grant directly, as his next of kin.⁴

§ 141. In *Ringhouse v. Keever*, 49 Ill. 470, which was an action of ejectment, it was held that, though formerly, where it was sought to prove death by reputation, proof of that reputation among the kindred only of the deceased would be admissible, yet the rule is now relaxed where the deceased left no kindred that are known, and reputation among the acquaintances of the deceased, is sufficient evidence of that fact.

§ 142. And where a will is lost or mislaid, whether accidentally or by design, its contents may be proved, and probate granted of the same upon such evidence as is satisfactory to the court. Upon this point Mr. Greenleaf says: "If the will is proved to be lost, it may still be admitted to probate, upon secondary evidence, as in the case of lost deeds and other writings. And though, as we have seen, if the will, shown once to have existed, cannot be found after the death of the testator, the presumption is that he destroyed it, with intent to revoke, yet this presumption may be rebutted by evidence. But if it be so rebutted, yet the contents of the will cannot be proved, unless by the clearest and most stringent evidence. This evidence must come from witnesses who have read the will, and whose recollection of its contents is trustworthy. To authorize the probate of a lost will, by parol proof of its contents, depending upon the recollection of witnesses, the evidence must be strong, positive and free from doubt. Courts are bound to consider such evidence with great caution, and they cannot

⁴ 3 Chicago Leg. News, 269.

act upon probabilities.⁹ Therefore where the evidence showed that the testator made a will, by which he undertook to make distribution of his estate, in certain shares, between his wife and children, but the witness would not swear positively as to some parts of the will, the court held it an insuperable objection to the probate of the whole; for the will was not such an one as could be proved in part and unproved in part; because the testator's intention could not be effectuated unless the whole could be proved and take effect.⁶ But some cases have allowed probate of so much of the will as can be satisfactorily established.⁷

§ 143. In case of a lost or destroyed will it should be shown, 1. That the will was duly executed; 2. That it was in existence at the time of the testator's death; or, 3. That it had been accidentally destroyed, without his consent or knowledge, or fraudulently, during his lifetime, or accidentally or fraudulently after his death; 4. Its contents.

§ 144. In case of loss it must be shown that an exhaustive search has been made for the missing will, in all places where there is the remotest possibility that it would be found, before any secondary evidence can be received of its contents.⁸ And it is competent, upon general principles, to introduce any proof which shows that the instrument propounded is not a valid subsisting will; and for that purpose to show that the same was revoked by a subsequent will, which was fraudulently destroyed, or destroyed by the testator when incompetent to perform a testamentary act.¹⁰ If a will is mutilated or partially or

⁵ 2 Greenl. Ev. § 688a; Ib. §§ 84, 509, 579; 2 Ib. 681, and cases cited; 1 Redf. Wills, § 28, pl. 9, and notes.

⁶ Davis v. Sigourney, 8 Met. 486.

⁷ Steele v. Price, 5 B. Mon. 58; Jackson v. Jackson, 4 Mo. 210; Dickey v. Malachi, 6 Mo. 177; Mr. Redfield justly observes that this must be a very unjust rule, unless where it is obvious that the parts proved have no dependence upon the other portions, or upon the distribution among the next of kin or heirs. 1 Wills, § 28, note 14.

⁹ Jackson v. Hasbrouck, 12 Johns. 192; Featherly v. Waggoner, 11 Wend. 599.

¹⁰ Nelson v. McGiffert, 3 Barb. Ch. 158

wholly destroyed by the testator, or by his direction, while in a competent state of mind to make an effective revocation, it will have no operative effect upon the instrument, and probate will be granted, the same as if no such act had been done, so far as the contents of the instrument can be ascertained.¹¹ It has been held that where a will was gnawed in pieces by rats, in the place of its deposit, probate may be granted upon such proof as is afforded by the memory of witnesses and the remaining fragments. A copy of an alleged lost will is obviously far more satisfactory than any amount of testimony dependent upon the memory of witnesses, but this is not indispensable.¹² But although the testimony of one witness, or of a copy verified by one witness, may be sufficient to establish the contents of a lost will, it is unquestionably necessary that the due execution of the instrument should be proved, as in ordinary cases.¹³

As to when wills will be presumed to have been destroyed with intent to revoke, see ante, §§ 67, 70, 73, 74.

§ 145. Tearing, cancelling, burning and obliterating a will as we have already seen, does not operate as a revocation thereof, unless the testator was of sound mind, and the act was done with intent to revoke.¹⁴ To establish such wills the proceedings would be the same as in case of lost wills.

Of course no lost will could be established without making the same proof of the execution and of the testator's capacity as would be required in establishing other wills.¹⁵

§ 146. The statute, title Wills, § 7, provides that, when a will or codicil shall be exhibited in the county court, for probate thereof, it shall be the duty of the court to receive probate of the same without delay, and to grant letters testamentary

¹¹ *Rhodes v. Vinson*, 9 Gill, 169; *Apperson v. Cottrell*, 3 Port. 51.

¹² *Jackson v. Swett*, 2 Caine's Cases, 303; *Jackson v. Russell*, 4 Wend. 543; *Happy's Will*, 4 Bibb. 553; 1 Green Ch. Rep. 220.

¹³ *Bailey v. Stiles*, 1 Green Ch. 220.

¹⁴ *Ante*, § 72.

¹⁵ See as to practice in the case of the proof of lost wills. *Everitt v. Iveritt*, 41 Barb. 385; *Yount v. Yount*, 3 Grant's Cas. 140.

thereon to the person entitled to such letters; and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights of the respective persons interested therein.¹⁶

§ 147. Section 2 provides that, if two of the attesting witnesses shall declare on oath or affirmation, before the county court of the proper county, that they were present and saw the testator sign the will or codicil, in their presence, or acknowledge the same to be his act and deed, and that they believed the testator to be of sound mind and memory at the time of signing or acknowledging the same;¹⁷ this shall be sufficient proof of the execution thereof to admit the same to record: *Provided*, that no proof of fraud, compulsion or other improper conduct be exhibited, which in the opinion of the court shall be deemed sufficient to invalidate or destroy the same; and every will or codicil when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of the court.¹⁸

§ 148. In the case of *Brownfield v. Brownfield*, 43 Ill. 147, Jarvis, one of the attesting witnesses, testified in reference to the execution of the will, that the testator either signed the will in his presence, or acknowledged his signature to him, but could not remember which; and the court say, "There was no error in admitting his testimony. If the testator did either, it was all the statute requires, and he swears in positive terms, that the testator did the one thing or the other. If so, the requirements of the statute are answered."

§ 149. And in *Walker v. Walker*, 2 Scam. 291, which was an appeal from the probate court, refusing the probate of a will, on the ground that the testator was of unsound mind and

¹⁶ It is no objection to the probate of a will that some of its provisions are void or not susceptible of being carried into effect. The probate only establishes the instrument so far as it is valid, and within the power of the testator to effect his purpose in that mode. *Clemens v. Patterson*, 38 Ala. 721.

¹⁷ Form No. 2.

¹⁸ For form of clerk's entry declaring the will properly proven and admitting it to record, see Form No. 6.

memory, and was tried by a jury in the circuit court, and probate of the will allowed, the supreme court says: "The subscribing witnesses alone should be permitted to testify to the mental condition of the testator. The law requires this to be done by them alone."¹⁹ And this is the law as it stands at present, so far as the county court is concerned. This decision was upon § 5 of the act of 1829, which is the same as section 7 of the present statute.

§ 150. But by § 13 of the present statute,²⁰ it is provided that, when the probate of a will is *refused* by the county court, and an appeal is taken from the order of the court refusing to admit the will to probate, into the circuit court, it shall be lawful for the party seeking the probate of the will to support the same on hearing in the circuit court, by any evidence competent to establish a will in chancery. Under this provision, in the case of *Andrews v. Black*, 43 Ill. 256, the case of *Walker v. Walker* was reviewed, and the effect of the 13th section upon section 7 explained, and the conclusion reached that, as the law now stands, on an appeal from the county court *allowing* the probate of a will, no other evidence can be heard on the trial, upon the question of the testator's sanity, than that of the subscribing witnesses; but where the probate has been *refused* by the county court other testimony can be heard in support of the will, and approves of the decision in *Walker* as qualified by section 13.

§ 151. And in the case of *Duncan v. Duncan*, 23 Ill. 364, which seems to have been carelessly reported, there being no statement of facts in the opinion or elsewhere, the court say,²¹ "The statute of wills, we think, does not prevent those having an interest in the will, from contesting its validity and due execution in the probate court. * * It is apparent that the legis-

¹⁹ This decision is approved in *Andrews v. Black*, 43 Ill. 256.

²⁰ Which is the same as § 1, Act 1845, R. S. 596, and was passed since the decision in *Walker v. Walker*.

²¹ It does not appear by the report whether this is an appeal from the county court, except inferentially, and no statement is made of the points in controversy.

lature designed to permit parties in interest to contest the validity of the will, as well in the probate court as in chancery.²² * * The contestants had the right to introduce evidence to invalidate the will, and in doing so, we can perceive no reason why they might not examine the witnesses who attested the will, as well as others."

§ 152. The ruling in the case last cited has been explained and qualified in *Andrews v. Black*, just referred to, in the opinion by Justice *Lawrence*, in which he says: "The appellants quote the case of *Duncan v. Duncan*, as overruling that of *Walker v. Walker*."²³ But the two cases are harmonious. All that is decided in the case of *Duncan v. Duncan*, relative to this subject, is, that other persons than the subscribing witnesses may be examined to *invalidate* the will. But the court was not speaking upon the question of sanity, but in reference to the latter clause of the second section which authorizes proof to be given of fraud, *compulsion or improper conduct*. It is in reference to this species of proof, that the court hold in *Duncan v. Duncan* that other than the subscribing witnesses may be sworn. This is a reasonable construction of the statute. It directs what testimony, to be made by the subscribing witnesses, shall be sufficient to entitle the will to record, with a proviso, that no proof be exhibited of fraud, compulsion or improper conduct. The first proof is confined to the subscribing witnesses, but the testimony of any other person, not otherwise disqualified, may be heard on the matters named in the proviso."

§ 153. In the light of these cases and of the statute under which they arose it would be safe to say :

1. That in the county court, and in the circuit court, on appeal from the order of the county court admitting a will to probate, the subscribing witnesses alone can be permitted to testify concerning the mental condition of the testator.

2. But on appeal from the order of the county court *refusing*

²² A devisee as well as an heir at law may contest a will, *Wolf v. Bollinger*, in Sup. Ct. 1872; 5 Leg. News. 112.

²³ 2 Scam. 291.

the probate, § 13 permits the party seeking the probate of the will to support the same, on hearing in the circuit court, by any evidence competent to support a will in chancery. This opens the way in such cases for the examination on both sides of witnesses who can testify to relevant facts concerning the testator's mental condition.

3. Both before the county court and on appeal, where the question is whether fraud, compulsion or other improper conduct has been used (see proviso to § 2) the testimony of other competent witnesses may be heard on both sides.

§ 154. We do not feel, however, like dismissing this subject without saying in reference to the contest of wills on grounds of fraud, compulsion or other improper conduct, that in order to properly establish these objections, in a great number of cases, the mental capacity or condition of the testator must necessarily be shown, and that refusing to admit pertinent testimony on this question, from other than attesting witnesses to the will, would amount to a denial of essential advantages intended to be secured by the proviso to § 2. In these cases it would be useless to contest, unless upon appeal under § 13, where the probate has been *refused*; in which case it is clear both parties may introduce any other witnesses and all kinds of pertinent evidence to prove the testator's mental condition. If the probate were granted by the county court, it would in those cases be useless to contest it by appeal, if the doctrine of *Duncan v. Duncan*, as explained and modified by the case of *Andrews v. Black*, is correct. A contestant might as well at once file his bill in chancery to set aside the will on the ground of fraud, compulsion or other improper conduct.

CHAPTER X.

PART II. OF THE WITNESSES AND THE SUFFICIENCY OF PROOF.

- § 155. Non-resident witnesses — Testimony may be procured by *dedimus*.
How done.
156. Where county judge is an attesting witness — how his testimony may be procured.
157. Deceased witnesses. Proof of handwriting.
158. Attesting witnesses who are beneficial devisees. Devise void as to such, with certain exceptions.
159. Creditors of the testator may be witnesses.
160. What is sufficient proof of the execution.
- 162–164. Testators' acknowledgment of the execution
165. Witnesses need not know at the time that the instrument is intended as a will.
166. Attesting witnesses,— what they must swear.
167. Where witnesses have forgotten what was said, or swear falsely, and probate is refused, other witnesses may be examined.
168. Credibility and competency of witnesses.
169. Deceased witnesses and those who have removed to parts unknown.
170. Advantages of a proper attestation clause.
171. Codicils proved in the same manner as wills, and their proof often sufficient proof of the wills.

§ 155. The statute, title Wills, § 4, provides that, "When any will, testament or codicil shall be produced to the county court, for probate of the same, and any witness attesting such will, testament or codicil, shall reside without the limits of the state, or the county in which such will, testament or codicil is produced for probate, or shall be unable to attend said court, it shall be lawful for the county court to issue a *dedimus potestatem*, or commission, annexed to such will, testament or codicil, directed to some judge, justice of the peace, mayor or other chief magistrate of the city, town, corporation, or county where such witness may be found, authorizing the taking and certifying of his or her attestation in due form of law. And if the person to whom any such commission shall be directed,

shall certify, in the manner that such acts are usually authenticated, that the witness personally appeared before him, and made oath or affirmation that the testator or testatrix signed *and published* the writing annexed to such commission, or acknowledged the execution thereof as his last will and testament; or that some other person signed the testator's name by his or her direction; that he or she was of sound mind and memory; and that said witness subscribed his or her name as witness thereto in the presence of the testator or testatrix, and at his or her request, such oath or affirmation shall have the same operation, and the will shall be admitted to probate in like manner, as if said oath or affirmation had been made in the court from whence such commission issued. (See Form of Dedimus, No. 3.)

§ 156. Section 5 of the same statute provides that, where a county judge has become a witness to any will which is required by law to be proved before him as such county judge, and his testimony is necessary to the proof of the same, it shall be his duty to go before the circuit court of his county, and make proof of the execution of such will, in the same manner that probate of wills is required to be made in other cases. And it is the duty of the clerk of the circuit court, forthwith to certify such will, proven as aforesaid, to the county court of the county;¹ and such will shall have the same force and effect that it would have had if the same had been proven by one credible witness before the county court; and if there are other witnesses to such will, the county court shall take their testimony in support thereof, as in other cases.

§ 157. Section 6 provides that, if one or more of the witnesses to a will be dead, or shall have moved to parts unknown to the parties concerned, so that his or their testimony cannot be procured, the county court, or other court having jurisdiction of the subject matter, may admit proof of the handwriting of such witness or witnesses and such other secondary evidence as is admissible in courts of justice, to establish written con-

¹ Form No. 4.

tracts in similar cases; and may thereupon proceed to record the same, as if such will had been proved by such subscribing witness or witnesses, in the usual manner.²

§ 158. Section 8 provides that, if any beneficial devise, legacy or interest shall be made or given in any will, to any person subscribing such will as a witness to the execution thereof, such devise, legacy or interest shall, as to such witness, be void, unless such will be otherwise attested by a sufficient number of witnesses exclusive of such person, according to the statute; and he may be compelled to appear and give testimony on the residue of such will, in like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of such share shall be saved to such witness as shall not exceed the value of the said devise or bequest made to him as aforesaid.

§ 159. Section 20 provides that, if any lands, tenements or hereditaments shall be charged with any debt by any will or codicil, and the creditor whose debt is so made a charge upon such lands, etc., shall attest the execution of the same, such creditor shall notwithstanding be admitted as a witness to the execution of such will.

§ 160. The statute has declared in section 2, what shall be sufficient proof of the execution of a will to admit it to record. It requires the testimony of two or more attesting witnesses to the following facts:

1. That they were present and saw the testator sign the will, or
2. That he acknowledged the same to be his act and deed, in their presence.
3. That they believed the testator to be of sound mind and memory, at the time of signing or acknowledging the will.

Under the first of these heads nothing need be said. The statute has made this requisition as clear as words can make it. (See ante, chap. IV.)

² See § 169, and Form No. 2.

§ 161. Where the witnesses to the will are strangers to the testator, his identity should be established by independent proof of his handwriting, or in some other satisfactory mode.³

§ 162. The testator must acknowledge the instrument to be his act and deed, in the witnesses' presence, if he did not sign it in their presence. But the acknowledgment need not be made to the witnesses in each other's presence, nor need the will be attested by the witnesses in each other's presence.⁴

§ 163. In *Allison v. Allison*, 46 Ill. 61, the evidence showed that, in the hearing of the testator and the witnesses, the attesting clause was read, reciting that he had executed the instrument as his will; and the testator thereupon handed one of the subscribing witnesses the pen, who having signed, handed it to the other, but the testator said nothing which the witnesses could remember; this was held to be a sufficient acknowledgment. The court declared that the statute does not require the acknowledgment of a will by a testator to be in language; any act which indicates unmistakable certainty is sufficient; clear and explicit acts are to be regarded rather than form. And in *Holloway v. Holloway*, 51 Ill. 159, the court said, "It was immaterial whether the witnesses were present when the testator signed the will, if he acknowledged it, and requested them to sign as witnesses."

§ 164. In Ohio, where the law requires, that if the witnesses do not see the will subscribed by the testator, they shall hear him acknowledge that he did subscribe it, it is not considered essential that this acknowledgment be made in words. It may be done by signs, motions, conduct or attending circumstances. It is sufficient, if in any manner the witnesses are given to understand, that the testator has signed the paper as his will; and this may be shown by direct or circumstantial evidence, and is matter of fact to be determined by the jury.⁵

³ *Mowry v. Silber*, 2 Bradf. Sur. 133.

⁴ 2 Bl. Com. 377; *White v. British Museum*, 6 Bing. 310; 7 Bing. 457.

⁵ *Raudebaugh v. Shelby*, 6 Ohio, N. S. 307, 315; S. P.; *Coffin v. Coffin*, 23 N. Y. 9; and see *Carle v. Underhill*, 3 Bradf. Sur. 101; *Peck v. Cary*, 27 N. Y. 9.

And it is sufficient if the witnesses sign before the testator; provided it be done at the same time and as part of the same transaction.⁶

§ 165. The statute does not require the witnesses to know at the time of attesting the paper that it is intended for a will.⁷

§ 166. Each of the attesting witnesses must swear that he believed the testator to be of sound mind and memory at the time of signing the will. In *Allison v. Allison*, 46 Ill. 61, which was an appeal from the order of the county court allowing probate of the will,⁸ one of the attesting witnesses swore that he did not know whether Allison, the deceased, was of sound mind or not, and the court said, "He should have been interrogated as to his belief. Although he had no positive knowledge, he undoubtedly had an opinion on this point, and his opinion or belief the law requires as indispensable to probate. The statutory requirement of proof of soundness of mind cannot be dispensed with."

§ 167. Where the attesting witnesses cannot remember what occurred at the time of the execution of the will; or where one or more of the witnesses under mistake, or for corrupt purposes, swear that the formalities required by the statute were not complied with, or that the testator was not of sound mind and memory, and probate is *refused* by the county court, for want of the formal proof required by the statute—upon appeal in such case, or in defense to a bill in chancery to set aside the probate of a will which has been allowed by the county or circuit court, the testimony of other than the attesting witnesses may be heard, to establish the will, and it may be established even against the testimony of the latter, and upon the weight of evidence. But the statutory requirements of signing by the testator or by some one in his presence, and by his direction, and the attestation by two or more witnesses

⁶ *Vaughan v. Burford*, 3 Bradf. Sur. 78.

⁷ See 1 Redf. Wills, § 18 pl. 13 and note.

⁸ In which case we have seen, ante, §§ 149–153, that none but the attesting witnesses can be heard relative to the testator's sanity. *Andrews v. Black*, 43 Ill. 256.

must be shown.⁹ The law in such cases is very clearly stated by *Treat, C. J.*, in *Rigg v. Wilton*, 13 Ill. 15, quoted at length. (Post, §§ 181-184.)

§ 168. And we have seen elsewhere (ante, § 44), that the witnesses must be credible and competent at the time of attesting the will; but whether they will be allowed to testify to the execution of the will, may depend upon events subsequent to that time. They might become interested in the provisions of the will, or infamous or insane, and their testimony be rejected. In such cases the will may be proved by other testimony.¹⁰

§ 169. Where an attesting witness is dead or has removed to parts unknown to the parties concerned, the fact of his death or removal should be shown to the probate court,¹¹ in order to lay the foundation for the admission of proof of the hand writing of such witness, and of other secondary evidence, as provided in § 6; and the evidence of death or removal should be preserved and recorded along with the other evidence in the case. The degree of diligence required in the search for the subscribing witnesses to a will is the same as the law requires in all cases to prove a loss. It must be bona fide, earnest, and intelligent, — such as one puts forth in attempting to learn the residence or place of business of any one, when it becomes important to his interest to learn such facts; it must be made in all places where the witnesses might be supposed to be found, after making inquiry in all places and of all persons, where and of whom intelligence may fairly be supposed attainable.¹²

§ 170. We have seen, ante, § 42, that no attestation clause is necessary, yet there are very clear advantages in having it; for, where such a clause contains all the particulars of a good execution, it will always be prima facie evidence of due execution, and will often prevail over the testimony of witnesses

⁹ 1 Redf. Wills, § 19, pl. 11.

¹⁰ *Sears v. Dillingham*, 12 Mass. 258.

¹¹ The attesting witnesses must be produced or their absence accounted for *Chase v. Lincoln*, 3 Mass. 236.

¹² 1 Greenl. Ev. 574, and cases cited.

who give evidence tending to show that some of the requisites were omitted.¹³ But the effect of the certificate of attestation by a deceased witness, will not be regarded as of the same force as his evidence if he were living; for it is evidence of an inferior nature. If supported by circumstances, although opposed by the testimony of another subscribing witness, it may be sufficient to support a verdict establishing a will; but, without any extraneous support, such a verdict against the positive testimony of a living witness, could not be maintained upon that evidence alone.¹⁴

§ 171. Codicils are proved in the same manner as wills, but unless a codicil is written on the same paper with the will, or by its terms unmistakably refers to the will, such will should also be proved as if no codicil existed. In *Duncan v. Duncan*¹⁵ it was held, that when a codicil to a will is written on the same paper as the will, or unmistakably refers to it, proof of the codicil is sufficient to establish such portions of the will as are not thereby revoked.

CHAPTER XI.

CONCLUSIVENESS OF PROBATE IN THE COUNTY COURT, IN COLLATERAL ACTIONS.

§ 172. Whether and to what extent probate in the county court is conclusive in collateral actions.

§ 172. The questions whether and how far the order of a county court admitting a will to record is conclusive and will bind other courts in collateral proceedings, have not been authoritatively adjudicated under the law of 1849.¹ As this

¹³ 1 Redf. Wills, § 19, pl. 11, and note.

¹⁴ Orser v. Orser, 24 N. Y. 51; Craft v. Craft, 4 Swab. & Tristram, 10, cited 1 Chicago Leg. News, 19.

¹⁵ 23 Ill. 364; see cases there cited.

¹ P. 62; Gross Stat. 526, § 5.

question is important where titles to land claimed under devises are in controversy, it may as well be considered here. In the case of *Ferguson v. Hunter*, 2 Gilm. 657, which was an action of ejectment, it was held that the act of taking proof of the execution of a will by a probate court is a ministerial, and not a judicial act, and that its acts in that respect may be inquired into in collateral proceedings. This decision was under the law of 1837,² providing for the election of probate justices, and defining their powers, in which the taking of the probate of wills and recording the same, are expressly declared to be ministerial acts. At that time probate courts were not courts of record. In 1849, county courts were established by statute,* declared to be courts of record, and their powers defined. They were to have a seal and a clerk. And by section 5, which is now in force, the clerk is to perform all of the ministerial duties heretofore performed by the probate courts. But the granting of letters testamentary, or of administration—except to collect—and repealing the same, and allowing or disallowing claims against estates of persons, determining who are entitled to said letters, requiring the settlement of estates and directing the issuance of citations and attachments, are to be considered as general judicial powers under the act. Now, have the creation of a new court having probate jurisdiction, and the changes in the statutes above indicated, changed the effect of an order of the probate court so as to make it conclusive in collateral proceedings?

It is a well settled principle that the orders and judgments of any court having jurisdiction of the subject matter of controversy and of the parties, are conclusive in all collateral proceedings. This principle is as applicable to probate cases as to any other class of cases, unless the statute expressly excepts them; and there does not appear to be any such exception as applied to county courts. The statute appears to treat the action of a county court adjudging the proof of a will sufficient and ordering it re

² P. 177; Gale's Stat. 427, § 5; copied into R. S. 1845, p. 426.

* Laws 1849, p. 62; Gro. Stat. 526.

corded, as judicial, and not ministerial acts. The following provisions may be cited in support of this view. 1. Sec. 2, title Wills, provides in substance that, where fraud or compulsion or other improper conduct is shown, which in the opinion of the court is sufficient to invalidate or destroy the will, the court may refuse to admit it to record. 2. The further provision of the same section declaring that a will proven as in that section provided, to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of the court, and shall be good and available in law for the granting, conveying and assuring the lands, goods, etc., thereby devised and bequeathed. 3. The right conferred by sec. 14 to appeal from the order of a county court allowing or disallowing a will to probate. Each of these provisions would seem to be sufficient to show that such an order was considered as a judicial act. If this is so, the order is binding upon the parties to it in all collateral proceedings, unless in cases hereafter mentioned. This brings us to the question of the jurisdiction of the subject matter. What facts confer this jurisdiction. They are 1st, The will. 2nd, The death of the testator. 3d, The proceedings must be before the court of the proper county; that is, the county wherein is the mansion house or known place of residence, if he has any, of the testator; if he has no known place of residence, and lands are devised by the will, such will must be proved in the county wherein the lands, or some part of the same, lie; and if he had no known place of residence, and no lands are devised by the will, the will may be proved in the county where the testator died, or where his estate or a greater part thereof was situated. (Sec. 11, title Wills.) In Illinois notice of the application for probate is not required to be given to heirs and others interested. They cannot therefore be bound by any implied assent to the jurisdiction and proceedings. If the court has not got jurisdiction of the subject matter, its proceedings are simply void, and may be attacked in a collateral action. In *Cutts v. Haskins*, 9 Mass. 543, it was held, in an action of ejectment, that the authority to grant administration

upon the estate of a deceased intestate who was at his death an inhabitant of the state, was vested by the statute exclusively in the judge of probate for the county where the deceased person dwelt at the time of his death, and the acts of any other judge of probate were void. It does not however appear from the report of that case, that the record of the probate court showed any proof of the residence of the deceased or any finding of the court of such residence. Had such a finding of the court appeared in the record it would be difficult to see how the grant of administration could have been attacked in collateral proceeding. It would be the better doctrine to treat the order of the court, where the facts necessary to sustain its jurisdiction of the subject matter appear in the proofs in the record or in the finding of the court, as conclusive to that extent, in collateral actions.

But the jurisdiction of the subject matter having been obtained by the court, could the subsequent proceedings of the court be attacked? It appears to me that they could. Take the case of *Ferguson v. Hunter*. This was an action of ejectment. The evidence to support the defendant's title consisted in an exemplification of a paper purporting to be the will of Jesse Davis, with the evidence of Foster, a subscribing witness setting forth that he signed the will as a witness, in presence of the testator, and the testator signed it in his presence, being then of sound mind and memory; and that he was not present at the signing by Bridges, the other witness. There was also a certificate that one Philip Creamer, who was a devisee and the executor named in the will, afterwards, in vacation, appeared before the judge and stated upon oath, that the paper in question was the last will and testament of the deceased. These were all the facts appearing in the record. I conceive that the court did right in rejecting the will, without regard to the questions whether the probate court had judicial or only ministerial powers in the premises. The statute of wills has declared — sec. 2, what evidence is necessary to establish a will. Whether there is or is not any contest in the county court about its execution,

two witnesses must declare on oath or affirmation, before the county court, that they were present, and saw the testator sign the will, or acknowledged the will to be his act and deed, and that they believed the testator to be of sound mind and memory at the time of such signing or acknowledgment. This the statute declares is sufficient to admit the will to record; unless proof of fraud, compulsion or other improper conduct is shown, which in the opinion of the court shall be deemed sufficient to invalidate or destroy the same.³ This evidence must all be reduced to writing, and recorded along with the will and remain in the clerk's office (secs. 2 and 18). Section 6 makes provisions for proving wills in case a witness is dead or cannot be found. In such cases his handwriting must be proved. But before this would be admissible, the fact should be proved to the satisfaction of the court that the witness was dead or could not be found, which proof should also appear in the record, or at least, that the court so found the fact to be. In *Ferguson v. Hunter*, the testimony of Bridges, one of the subscribing witnesses to the will, was not procured, nor was its absence accounted for by showing his death or removal to parts unknown, and proving his handwriting. There was therefore no legitimate proof of the execution of the will made by any but the witness Foster; and this, by itself, was insufficient. The quantum of evidence made absolutely necessary in every case by the statute was not produced. The record should have shown the existence of every fact made necessary by the statute, or the order admitting the will to probate was not supported. Suppose the record showed no proof of the execution of the will, but disclosed facts showing jurisdiction of the subject matter together with an order admitting it to probate and record, would it be contended that this was sufficient? The proofs of execution prescribed by the statute and required to be preserved in the record, if not jurisdictional facts, it seems to me are made by the statute precisely as essential, and to be of equal dignity with them; and the want of those proofs would

³ See *Rigg v. Wilton*, 13 Ill. 15.

be as fatal to the order of probate in collateral proceedings as would the want of jurisdiction of the subject matter.⁴

But when all the jurisdictional facts are shown, and the will has been proved as provided by the statute, but is assailed for fraud, compulsion or other improper conduct, the order of the county court admitting it to probate is conclusive in collateral proceedings. It cannot be objected in such case, that the court erred in sustaining the will as against the evidence of fraud produced by the party opposing the probate.

CHAPTER XII.

APPEALS FROM THE ORDER OF THE COUNTY COURT ALLOWING OR REFUSING PROBATE.

§ 173. Appeals allowed to any person interested in the will.

174. In case of refusal to allow probate.

175. The effect if appeal is not taken.

176. Trial is by jury in cases of appeal.

§ 173. Section 14, of the statute, title Wills, authorizes appeals to be taken from the order of the county court, allowing or disallowing any will to probate, to the circuit court of the same county, by any person interested in the will,¹ in the same time and manner as appeals may be taken from justices of the peace, except that the appeal bond and security may be approved by the clerk of the county court; and the trials of such appeals shall be *de novo*.

§ 174. Section 13 provides that, when the probate of a will

⁴ See *Farrell v. Patterson*, 53 Ill., where it is held that if a will is not properly authenticated it is not admissible for any purpose as evidence.

¹ In the estate of Dennis McAvoy, 28 Leg. Int., Paxton, J. on appeal held, that a widow of a testator, not being bound by the will of her husband, has no right to contest the validity of such will, citing *McMasters v. Blair*, 5 Casey, 298.

shall have been *refused* by the county court, and an appeal is taken to the circuit court from the order or decision of such court refusing to admit such will to probate, the party seeking the probate of the will may support the same, on hearing in the circuit court, by any evidence competent to establish a will in chancery;² and in case the probate is allowed, the will shall be admitted to probate, liable, however to be subsequently contested, as provided in case of wills admitted to probate in the first instance.

§ 175. It will be observed that § 13 permits an appeal to be taken from the order of the county court refusing the probate of a will, and, if, upon trial in the appellate court, the order of the probate court is sustained and probate is refused, there is no provision for any other mode of contesting the matter by any one, and the final decision refusing the probate, is conclusive upon all parties. Not so, however, where the will is admitted to probate by the appellate court. In this case a bill may be filed in chancery, by any party interested, within three years, to contest the validity of the will, as provided in § 7, in cases where the probate is allowed by the county court, and no appeal is taken.

§ 176. It is the practice to try appeals in these cases by jury; as in *Walker v. Walker*, 2 Scam. 291; *Blaney v. Sargent*, 1 Mass. 335; *Hubbard v. Hubbard*, 6 Mass. 397. And, as the trial is *de novo*, the burden of proof is on the party affirming the validity of the will, and he has the right to open and close the case, as he is first to prove the execution of the will, and to examine the subscribing witnesses as to the sanity of the testator.³

² See post, §§ 181-184.

³ *Brooks v. Barrett*, 17 Pick. 94.

CHAPTER XIII.

BILLS IN CHANCERY TO CONTEST THE VALIDITY OF
WILLS.

- § 177. Validity of wills may be contested by proceedings in chancery within three years after probate — exceptions in favor of infants, etc.— Trial to be by jury.— Evidence.
178. Forms in making up the issue for trial.
179. Burden of proof on the party affirming the validity.
180. Allegation of undue influence is equivalent to that of fraud.
- 181–184. Practice in these cases as stated in *Rigg v. Wilton*.
185. Fraud and other improper influences in procuring the will.
186. Fraud in these cases cannot be exactly defined. It is always a question of fact, not of presumption.
187. Fraud often mixed up with undue influence, and the two to be treated of together hereafter.
- 188, 189. What influence over testator is permissible.
190. A will procured by fear is not valid.
191. Transaction to be carefully scrutinized where a beneficiary under the will has a controlling agency in procuring its execution.
192. If provisions of the will are unreasonable, the effect stated.
193. Provisions in favor of one not a relative. — Effect of previous declarations.
194. Adulterous relations between testatrix and devisee, not of itself sufficient to invalidate the will.
195. The general principle stated.
196. Facts which are in favor of the validity of the will.
197. A will made under undue influence is void and cannot by subsequent recognition be rendered valid.
198. The effect of the undue influence is to invalidate every part of the will produced thereby.
199. Effect where provision is made in favor of one who in consideration thereof agrees to perform any act.
- 199a. Expense by executor in defending will chargeable against the estate.

§ 177. Section 7, by way of proviso, declares, that if any person interested shall, within three years after the probate of a will or codicil in the county court, by his bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or

not; which shall be tried by a jury in the circuit court of the county wherein the will or codicil was proven and recorded, according to the practice of courts of chancery in similar cases; but if no such suit shall be commenced within the time aforesaid, the probate shall be forever binding and conclusive on all parties concerned, saving to infants, *femes covert*, persons absent from the state or *non compos mentis*, the like period after the removal of their respective disabilities. And in all such trials by jury, the certificate of the oath of the witnesses at the time of the first probate, shall be admitted as evidence, and have such weight as the jury shall think it may deserve.

§ 178. The following may serve as forms in making up the issue out of chancery:¹

STATE OF ILLINOIS, *Henry County* — ss.

C. B.	} <i>In the Circuit Court. — In Chancery.</i>
vs.	
D. B.	

And now, the court here having ordered an issue to the country, the said complainant comes and says that the instrument aforesaid, purporting to be the last will and testament of said A. B., deceased, is not in fact the last will and testament of him the said A. B., because he says that said A. B., at the time of the execution and attestation thereof, was not of sound mind and memory (or other cause), and this he is ready to verify; wherefore he prays judgment that the said order of the said county court admitting the said instrument to probate as the last will and testament of said A. B., may be set aside and annulled, and for his costs.

By R. B., his attorney.

And the said defendant says that the said A. B., deceased, at the time aforesaid, was of sound mind and memory, and this he prays may be inquired of by the country.

By C. F., his attorney.

And the said complainant doth the like.

By R. B., his attorney.

¹ Hubbard v. Hubbard, 6 Mass. 399; Brooks v. Barrett, 7 Pick. 98; See Rigg v. Wilton, 13 Ill. 15.

§ 179. On the trial of the issue concerning the testator's sanity in these cases the burden of proof is on the party affirming the execution of the will, and he has the right to open and close the argument. He is called upon to establish anew its execution and validity.³ Where the defendants put in evidence, as the last clause of § 7 authorizes, the testimony of the subscribing witnesses, given when the will was admitted to probate, the court said, "This was *prima facie* evidence of its validity. This testimony raised a presumption of the competency of the testator, which would be valid until disproved by counter testimony; and placed upon the contestants the burden of showing incompetency of the testator, by proof sufficient to overcome the *prima facie* case made by him." The proof of insanity then devolves upon the contestant; sanity in such cases is presumed.⁴

§ 180. The allegation of undue influence is tantamount to that of fraud, and like it, the burden of proving that fact rests upon the party alleging it.⁵

§ 181. The opinion of the supreme court in *Rigg v. Wilton*, 13 Ill. 15, states the law in relation to this class of cases so clearly and fully, and sustains its conclusions by such cogent reasoning, that the considerable space we shall occupy with a portion of it may be considered well employed. *Treat, C. J.*, said, "This was a feigned issue out of chancery, to determine the question, whether a certain paper was the last will and testament of Clement Rigg. The plaintiffs alleged that it was not his last will and testament; the defendants affirmed that it was. On the trial the defendants were allowed to open and conclude the case; and both of the subscribing witnesses to the will were introduced, and testimony was offered tending to show that Rigg was of unsound mind and memory at the time of the execution thereof." (This proceeding was had under the 6th section of the Statute of Wills, 1845, which is the same as the 7th

³ *Rigg v. Wilton*, 13 Ill. 15; *Potter v. Potter*, 41 Ill. 80.

⁴ *Ibid*; *Holloway v. Galloway*, 51 Ill. 159.

⁵ *Myatt v. Walker*, 44 Ill. 485.

⁶ *Roe v. Taylor*, 45 Ill. 485.

section of the present statute.) "The issue is to be submitted to the jury as a new and original question, and determined exclusively upon the evidence introduced before them. The trial is *de novo*, and without regard to the fact that the instrument has been admitted to probate. The certificate of the oaths of the witnesses at the time of the probate, may be offered in evidence by either party; but it is to receive such weight only as the jury may think it deserves, in connection with the other proof in the case.

§ 182. "We are satisfied that this rule of construction is sound and reasonable, and well calculated to carry out the real intention of the legislature. In practice it will best promote the ends of justice, and protect the rights of parties. Wills are generally admitted to probate upon *ex parte* statements of the attesting witnesses, when no opportunity is afforded the parties interested to appear and insist on their rights. The object of the statute in question is to give them the benefit of a full and thorough investigation of all the circumstances attending the execution of the will. And they are not to be embarrassed or prejudiced by the previous proceedings before the probate court. The party who relies on the will is called upon to prove anew its execution and validity. And what he is required to prove to sustain the instrument, the other party is permitted to disprove in order to defeat it.

§ 183. "There are some indispensable requisites to the due execution of a will. It must be signed by the testator, or by some one in his presence and by his direction, and attested in his presence, by two or more witnesses. A paper that has not thus been subscribed and witnessed, has no force or effect as a will under our statute. But as to all other questions affecting its validity, such, for example, as the sanity or capacity of the testator, no particular quantum of evidence is necessary on the trial under the statute. The jury are to hear the proofs submitted by the parties, and decide the issue as they would any other question of fact, according to the weight of evidence.

§ 184. "Nor is it essential that the proof should be made by particular witnesses. The subscribing witnesses need not con-

cur in testifying to the sound mind and memory of the testator; and the will may even be established against their testimony. The party sustaining the will is not bound to call them, although a failure to do so, unexplained, might be regarded as a suspicious circumstance. It is enough that the jury are convinced, from any legitimate testimony, of the sanity and capacity of the testator. It would indeed be a harsh rule to hold, that after a lapse of many years, a will could only be established by the concurring testimony of two of the subscribing witnesses. They may be in the interest of the assailants of the will, or beyond the reach of those seeking to sustain it. It may be true, that in the admission of a will to probate *in the first instance*, two of the attesting witnesses must declare the circumstances under which it was executed, and their belief that the testator was of sound mind, and memory. But the reasons for such a requisition are to be found in the fact, that the will may be presented by the executor, and admitted to record upon the *ex parte* testimony of the witnesses, without notice to the parties interested, and without an opportunity on their part to appear and resist the application. But these reasons do not exist in the case of the trial of an issue out of chancery. In such case the parties are brought before the court for the express purpose of having all questions respecting the validity of the will forever put at rest. It was clearly the design of the legislature that an issue under the statute should be determined, like every other issue out of chancery, upon the weight and preponderance of the testimony adduced by the parties. This may be gathered from the expression in the statute that the issue shall be tried by a jury, 'according to the practice of courts of chancery in similar cases.' And it is further evidenced by the act of the 25th of February, 1845" (now § 13, title Wills), "which declares, that when probate of a will shall be refused, and an appeal shall be prosecuted, the party seeking probate may support the will, by any evidence that would be competent on the trial of an issue out of chancery for contesting the validity thereof."

§ 185. We next proceed to the consideration of specific

charges of fraud and other improper conduct and influences in procuring the execution of the will.

§ 186. Fraud in respect to the execution of wills, like fraud in other transactions, cannot well be exactly defined. Fraud in procuring the execution of wills is always a question of fact, and never a presumption of law. The testator cannot voluntarily and knowingly participate in it. Its very essence consists in his being imposed upon by the acts of some other person concerning the will, and substituting the will of another in the place of his own; as, by intentionally misstating its contents to a testator who could not or did not read it; or by omitting to read some important provision; or pretending to read provisions as being in it which are not there, leaving him to believe, when it was signed and witnessed, that it was written as it was read, or as its contents were stated to him; or by wrongfully substituting one paper for another, and having him sign the substituted paper for his will, under the belief it was the one he intended to sign.⁶ These and the like are cases of simple fraud, and courts unhesitatingly set aside wills so procured. They call for no further consideration here.

§ 187. But there are cases where fraud is so shrewdly mixed up with what is denominated undue influence, or as the statute terms it, "other improper conduct,"—expressions even more undefinable than fraud, that it is impossible to treat of one of them entirely separate from the other. These constitute a large proportion of contested will cases, and will hereafter be treated of together.

§ 188. We may now properly examine the cases, and see what influence over the testator is permissible. In *Small v. Small*, 4 Greenl. 220, the court says: "If a wife by her virtues has gained such an ascendancy over her husband, so riveted his affections, that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influ-

⁶ See *Small v. Allen*, 8 T. R. 147.

ence, importunity or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was especially exerted, to procure a will of such a kind, as to be peculiarly acceptable to her, and a disappointment of others." The supreme court of Illinois in a recent case,⁷ where it was charged that the will was made at the instance of the principal devisee, said: "If it was so made, the will would be no less entitled to record in the absence of all proof of fraud, compulsion or improper conduct, or of improper means used by him to induce the testatrix to act at his instance and according to his wishes. There must be no fraud or contrivance employed to induce a party to make a will in a particular way. If all is fair and the result of honest argument and persuasion, or of such influence as one may properly obtain over another, the will must stand, on the principle that a person can dispose of his property by will as he may choose, if he be of sound mind and memory."⁸

§ 189. It is said that no degree of influence over another, which is general, and operating at all times, and upon all subjects, and which is not specifically exerted to procure the testament in question, will be sufficient to avoid it.⁹ On the other hand, neither advice, nor argument, nor persuasion, would vitiate a will made freely, and from conviction, though such a will might not have been made, but for such advice and persuasion.¹⁰ And it is not every degree of importunity that is sufficient to invalidate a will. But there may be great and overruling importunity and undue influence, without fraud, which, when established, may and ought to have the effect to avoid a will, such as the immoderate persevering, and begging importunities and flattery of a wife, who will take no denial, pressed upon an old and feeble man, which may be better im-

⁷ *Dickie v. Carter*, 42 Ill. 376.

⁸ *Elliott's Will*, 2 J. J. Marsh. 340; *Miller v. Miller*, 3 S. & R. 267.

⁹ *Small v. Small*, 4 Greenl. 220.

¹⁰ *Chandler v. Ferris*, 1 Harring. 454, 464.

aged than described; or dominion obtained over the testator under the influence of fear, produced by threats, violence or ill-treatment. In neither of these instances may there be any direct fraud; but an overruling influence upon the mind and feelings of a testator, according to the degree of his judgment and firmness.¹¹ The influence which shall deprive one of the testamentary power, must be of a nature to, and go to the extent of, destroying free agency;¹² and it must operate at the time the will is made, and produce that perversion of mind which made the will.¹³

§ 190. When a will is induced by fear, it is not valid, not only in respect to the person who put the testator in fear, but with respect to other persons, though ignorant of the fear which constrained the testator to make the objectionable provisions in their favor. And though the fear, or threat, be not of present execution, it nevertheless avoids the testamentary act, done while it operates upon the mind of the testator.¹⁴ But it is now said that if the will was made while under the influence of fear or compulsion, the testator may so ratify and confirm it, after all apprehension is removed, as to render it valid.¹⁵

§ 191. When the party to be benefited by the will, has a controlling agency in procuring its formal execution, this fact is universally regarded as a suspicious circumstance, requiring the fullest explanation. Thus, where a will was written by an attorney, who was to be benefited by its provisions, it was considered that this circumstance should excite stricter scrutiny, and required clearer proof of capacity, and the free exercise of voluntary choice.¹⁶

§ 192. So, where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his property and family, this of itself, will impose upon

¹¹ Buchanan, C. J., in *Calvert v. Davis*, 5 Gill & J. 301.

¹² *O'Neill v. Farr*, 1 Rich. 80; *Roe v. Taylor*, 45 Ill. 485.

¹³ *Jencks v. Court of Probate*, 2 R. I. 255; *McMahon v. Ryan*, 20 Penn. St. 329.

¹⁴ *Swinb.* part 7, § ii. See post, §§ 196, 197.

¹⁵ 1 Redf. Wills, § 38, pl. 10. See post, §§ 196, 197.

¹⁶ *Duffield v. Robeson*, 2 Harring. 384.

those claiming under the instrument, the necessity of giving some reasonable showing that its character is not the offspring of mental defect, obliquity or perversion. As where it appeared, that the testator's mind was so far impaired by disease, as to render him an easy dupe to the acts and intrigues of those by whom he was surrounded, and that, while in a bedridden and paralytic state, the will was procured by taking advantage of his condition, by which he made a different disposition of his property from that which he otherwise would have done, it was held, on appeal from the decision of the surrogate, that it could not be admitted to probate.¹⁷

§ 193. Although the fact that a testator makes a will in favor of one not a relation, may be suspicious, nevertheless, affirmative proof of undue influence will be required to invalidate it.¹⁸ And it is obvious, that in cases of alleged undue influence, it must have a very controlling effect upon the validity of the will, whether the testator's previous declarations of affection and intention confirmed the will or not.¹⁹ Accordingly evidence of the testator's previous declarations, made at different times, that he intended to make provisions similar to those in his testament, will be admitted to rebut the idea of undue influence.²⁰

§ 194. In the case of *Dickie v. Carter*, 42 Ill. 376, where it was alleged that an adulterous relation existed up to the time of the execution of the will, between the testatrix and the party in whose favor the will was made, the court held, that however immoral such a relation may be, it is not sufficient to invalidate a will made in favor of the wrong-doer, if no improper influences were exerted to induce the will.²¹

§ 195. The principle deducible from all the cases seems to be, that the undue influence, of whatever character, which invalidates a will, must be exerted in bad faith, for the purpose,

¹⁷ *Clark v. Fisher*, 1 Paige, 171, and see 1 Redf. Wills, § 38, pl. 47.

¹⁸ *Jenckes v. Court of Probate*, 2 R. I. 255.

¹⁹ *Allen v. Pub. Admr.* 1 Bradf. Sur. 378.

²⁰ *Neel v. Potter*, 40 Penn. St. 483. Ante, §§ 116-118.

²¹ 1 Redf. Wills, § 38, pl. 45, 46.

and must go to the extent of, depriving the testator of his free will in reference to the disposition of his property made by the will. Whether imposed upon by false representations, made by the beneficiary, of ill will or misconduct towards the testator on the part of those who would, but for such representations, have received his bounty or shared his estate; or by fears of violence, or by threats of displeasure, they must have been made or caused for the purpose of operating upon and prejudicing his mind, and must have so operated at the time of making the testament, producing such a disposition in favor of the person exerting or causing the influences to be exerted, as would otherwise not have been made.²²

§ 196. But it must always have great weight in favor of a will, if the testator was relieved from the alleged mental infirmity, or undue influence, for which it was attempted to be set aside, for a considerable length of time after its execution, and the will itself was during that time within his easy control, and its contents well known to him, without his attempting to make any alteration in, or to revoke the same. And if these things concurred with occasional conversations concerning the provisions of the will, it would seem to have overwhelming weight in favor of sustaining it. For the effect of such evidence would be to show 1st, that there was in fact no undue influence exerted over the testator,²³ and 2nd, if there was, a subsequent ratification or confirmation by him, if the latter idea is admissible.

§ 197. It was held in the case of *Taylor v. Kelley*,²⁴ that a will made under undue influence, is so absolutely void, that it cannot be rendered valid by any subsequent recognition, unless in writing, and so executed as to amount to a republication or re-execution. And this we take to be the just view of the question; for it can hardly be said to be consonant with the spirit of the law that a party who is shown to have obtained a will by wrongful or undue influence, should have the benefit

²² See *Blakey v. Blakey*, 33 Ala. 611; *Taylor v. Kelley*, 31 Ala. 59.

²³ *Ibid.*

²⁴ 31 Ala. 59. And see ante, § 10.

of doubtful acts afterwards in his favor to give him the property he had sought to obtain by unlawful means.

§ 198. The effect of procuring a will by undue influence is this;— if the influence extends to the whole will, the whole will be declared void,²⁶ but if it extends only to the provisions in favor of the party exerting that influence, or, in whose behalf he exerted that influence, those provisions are void, and the others valid.²⁶

§ 199. In every case, where one induces the testator, to omit a provision in his will on behalf of another, by assurances that he, being the heir, or personal representative, or residuary legatee, will see such person paid the legacy or other provision contemplated, it is treated as an estoppel, upon the party, or a virtual fraud, to refuse performance, whereby a legal duty is imposed, and it will be enforced in a court of equity. Thus, where the trustee of a fund, to which he would succeed in case of intestacy, prevented the making of a will in favor of a third party by promising to hold the fund for the intended legatee, the latter may recover its value as money had and received to his use. And where the trustee under a will induced the children of the testator to assent to the sale of certain property belonging to the estate, by a promise to leave them as much as they could get under their father's will, the trustee being also a partner with the purchasers, it was held to be a valid contract, upon sufficient consideration, and not within the statute of frauds, and enforceable in a court of equity against the estate of the trustee after his decease.²⁷

§ 199 a. A decedent's estate is chargeable with the reasonable expense of the executor in an unsuccessful effort made by him in good faith to resist a contest of the will.²⁸

²⁶ *Florney v. Florney*, 24 Ala. 241.

²⁶ *Lord Trimblestown v. D'Alton*, 1 Dow & Cl. 85; *Bridgman v. Green*, 2 Vesey sen. 627; *Huguenin v. Basley*, 14 Ves. 273, 282.

²⁷ 1 Redf. Wills, § 38, pl. 6 and notes.

²⁸ *Bratney v. Curry*, 33 Ind. 399.

CHAPTER XIV.

EXTRINSIC EVIDENCE TO ESTABLISH FRAUD AND UNDUE INFLUENCE.

§ 200. Statutory provision.

201. Fraud and the like may be established by parol evidence, and by a preponderance of testimony—What facts may tend to show it.

202–204. Examples of the wide range of allowable testimony.

§ 200. By the statute, section 2, fraud, compulsion or other improper conduct may be shown, to prevent the admission of a will to probate. So these or any other pertinent facts may be shown, where a bill is filed in chancery, under section 7, to contest the validity of a will upon an issue whether the writing produced be the will of the testator or not.

§ 201. Fraud and undue influence and the like may be established by parol evidence, and by a preponderance of testimony.¹ This evidence may consist of a great variety of circumstances, such as the age, health, mental vigor, and soundness of the testator, his domestic surroundings with respect to persons, the state of his property, the character and degree of influence employed, etc. But it is obvious that each case must depend very much upon its own circumstances.

§ 202. As examples of the wide range of testimony in support of and in reply to the charges of undue influence and weakness of mind, as the moving and proximate causes of the will, a few cases may be referred to. Thus, another will executed eight years before, making a different disposition of the testator's property, has been received, as tending to support the claim of undue influence.² And on the other hand, evidence of harshness, abuse and menace, on the part of the beneficiary, and timidity on the part of the testator, will induce the court

¹ *Rigg v. Wilton*, 13 Ill. 15.

² *Hughes v. Hughes*, 31 Ala. 519.

not to disturb a verdict against the will.³ And evidence tending to show the previous purposes of the testator, in regard to the disposition of his property, is receivable, upon the question of the capacity to comprehend the will, and how far it was the result of free will.⁴ It is always competent, upon a question of testamentary capacity, to show the provisions of the will are reasonable, and correspond to the repeated prior declarations of the testator in regard to his intentions.⁵ And the contrary may be shown to discredit the will.⁶ Unpublished wills are also admissible upon this question.⁷ But in many well-considered cases, declarations of the testator, tending to show his wishes, in regard to the disposition of his property, made for periods more or less remote from the time of the execution of the will, have been rejected.⁸

§ 203. In a case in Vermont,⁹ very remote circumstances tending to show the improbability of the testatrix having acted understandingly, and free from extraneous influence, in making her will was allowed to be introduced; as that she had brothers and sisters in necessitous circumstances, for whom she cherished feelings of affection, but for whom she made no provision in her will, the principal legatee being her brother, and of intemperate habits. And it was also allowed to be proved, that, for four years before the execution of the will, during a good portion of every year, she appeared strange and unnatural in her conduct, habits and conversation, and different from what she was before that period.

§ 204. And in a late case in Michigan,¹⁰ a very wide range of inquiry was indulged by the court. It was there held, that

³ *McDaniel v. Crosby*, 19 Ark. 533.

⁴ *Means v. Means*, 5 Strobb. 167; *Neel v. Potter*, 40 Penn. St. 483.

⁵ *Pancoast v. Graham*, 15 N. J. Ch. 294.

⁶ *Boylan v. Meeker*, *id.* 310.

⁷ *Love v. Johnson*, 12 Ired. 355.

⁸ *Landis v. Landis*, 1 Grant's Cas. 249, where the declarations were made more than two years before the execution of the will. 1 Redf. Wills, § 39, and cases cited, and see *Allen v. Pub. Admr.* 1 Bradf. Sur. 378.

⁹ *Fairchild v. Bascomb*, 35 Vt. 398.

¹⁰ *Beaubien v. Cicotte*, 12 Mich. 459.

a will, being assailed for fraud and undue influence on the part of the wife, statements of the testator that he regretted his marriage, that he was not master at home, that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house, are admissible evidence. The will having disinherited the testator's relatives in favor of his wife and her relatives, it was held competent to prove the wife's abuse of the husband's relatives, and her quarrel with him about a former will by which he had made provisions for them. A wide range of inquiry into the family relations and the terms upon which they lived is allowable in these cases. Evidence that the testator made no complaint of any importunities on the part of his relatives is also admissible in such case, where it appeared that the wife had made charges to him of their rapacity. Evidence of former wills and of other pecuniary arrangements for the wife is also admissible, as having a bearing upon the question whether the testator has understandingly and of his own free will changed his settled views.

CHAPTER XV.

EFFECT OF WILLS RECORDED HERE, AND OF FOREIGN WILLS PROVED ABROAD AND RECORDED HERE.

§ 205. Effect of wills proved here. Statutory provision.

206-208. Foreign wills — provision for recording here, and the effect.

§ 205. The statute, title Wills, § 2, declares that wills proved and recorded as required by that section, shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed.

If a will is not properly authenticated it is not admissible for any purpose as evidence.¹

§ 206. The statute, title Wills, § 10, provides that, all original wills, or copies thereof, certified according to law, or exemptions from the records in pursuance of the law of congress in relation to records in foreign states, may be recorded as aforesaid, and shall be good and available in law, the same as wills proved in such county court.

§ 207. Section 9 provides that, all wills and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with a certificate of the proper officer or officers, that said will or codicil or copy thereof was duly executed and proved agreeably to the laws and usages of the state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this state. •

§ 208. Under the last section, (which is numbered eight in the Rev. Stat. 1845,) a copy of a will, executed and proved in the state of New York, to which were attached a copy of the testimony of the subscribing witnesses and the order admitting it to record, and a certificate of the clerk of the surrogate's court setting forth that the will "was duly proved and admitted to probate and record by Charles McVean, surrogate of the county of New York, * * according to the laws of the state of New York," it was held in *Shepard v. Carriel*, 19 Ill. 313, that the certificate of probate in New York was conformable to our statute, and that it sufficiently appeared from it that the will was duly executed and proved agreeably to the laws and usages of that state. And in *Gardner v. Ladue*, 47 Ill. 211, a copy of a will executed and proved in the state of New York and certified in conformity to our statute, though it had been proved by only one subscribing witness, was held suffi-

¹ *Farrell v. Patterson*, 43 Ill. 53.

cient; the court saying "only one subscribing witness was necessary under the statute of New York then (1826) in force." In these cases the wills were offered in evidence to prove title to lands; and in the former case it was objected that the will was not recorded in the county court previous to the commencement of the suit; to which the court said, "It was wholly immaterial when the papers were filed in the probate court of our state." And the court further says: "The right of the party claiming under the will arises out of the will, and by the will, and where the will is probated, the proof, at the same time, is created of this right, which vested at the death of the testator, the probate not conferring the right, but being merely evidence of the right." In the case of *Newman v. Willets*, 52 Ill. 99, it was held in reference to a will executed and proved in Louisiana, and the probate properly certified, that it was not necessary in order to make it evidence to probate it in Illinois, nor that it should be recorded in the county where the land lies.

CHAPTER XVI.

FORMS OF WILLS.

- § 209. Comments on the necessity of care, skill and experience in drafting of wills.
210. Form No. 1 with notes and comments on its provisions, and on the law of dower; homestead—the heirship of wife, her right to renounce—her award—sale of land by executor—lapsing of legacies—where the word heirs necessary to prevent lapse—who may be executors—seal, when necessary—attestation clause—witnesses, etc.
211. Form No. 2. Comments on the effect of mortgages on devised premises.
212. Form No. 3. Comments on the appointment of guardians—trustees.
213. Form No. 4. Codicil.
214. Form No. 5. Nuncupative will and directions.

§ 209. It is to be regretted that there is a tendency in the minds of inexperienced persons to underrate the importance of care and accuracy in preparing wills. A neighboring justice of the peace or other person, wholly unlearned in the intricacies of the law in relation to wills and the settlement of estates, is often called upon and urged to perform this act — one requiring great knowledge of law, a sound judgment concerning the duties of men towards their families, and much knowledge of the value of property. And such a person often prepares a will in haste and without adequate knowledge of the testator's property and debts, and with an imperfect knowledge of his family and the objects of his bounty, and with little thought of the many contingencies liable to arise, both to property and donees. Now, can it be a wonder if in such circumstances mistakes creep into the description of property; if insufficient means are provided for the objects proposed, or contingencies have not been foreseen and guarded against? Can it create wonder if sometimes wills, because of ill considered provisions, involve children and friends of the testator in expensive litigation, producing family quarrels, and making his well meant efforts a curse to the objects of his bounty? The accumulations of a lifetime, which taxed all of the testator's mental and physical energies to acquire, are sometimes disposed of when he is too feeble to do any business or to feel any interest in it. Beyond a few leading provisions in his will he thinks of no more. Then is the time, if ever, when the testator needs the advice and aid of a sound lawyer, and a wise and judicious man, to state clearly the effect of every desired provision, suggest contingencies which may not have occurred to his mind, and in various ways to anticipate, and lay before him, the probable and possible results of what he is doing. Besides, a judicious adviser may be able to point out means of saving trouble to the executor, and needless expense in the settlement of the estate. For example, where a testator deals largely in lands, as many do in the western states, his estate might be saved the expense of tedious proceedings in chancery, if his will contained a power authorizing the executor to convey to the purchaser such lands as the testa-

tor might at the time of his death be liable under any contract to convey, upon the receipt of the purchase money. The following forms it is to be hoped will aid those who may be called upon to prepare wills in those cases which will be most likely to occur; but it is not pretended that they will enable one to dispense with legal knowledge, and the exercise of a discriminating judgment.

FORM NO. 1.

§ 210.

I, A — B —, of —, in the County of —, in the State of Illinois, do make and declare this to be my last will and testament.

First. I direct that my funeral expenses and all my just debts be fully paid.

Second. I give and devise unto my beloved wife, F — B —, the following described tract of land situated in said county; to-wit, the south west quarter of section ten, in township fourteen north, range five east of the fourth principal meridian, during her life, without impeachment of waste; and I give and bequeath unto my said wife all of my personal estate of every description whatsoever, except as herein otherwise provided.¹

¹ In the disposition of property to the wife by devise or bequest it must be borne in mind that she has a right to renounce the provisions of the will and take such interests in the estate as would be given to her by the statute if the estate were intestate. Hence in general the testator should so well provide for her as to make it for her interest to accept the provisions of the will. This right of election which the widow has, is intended to protect her against both intentional and accidental deprivation of her just rights, by means of the testamentary provisions. But it is not intended to give her a right to defeat a particular disposition of the will, where that would be for her benefit, and yet claim some other disposition thereof which would favor her. She must take wholly under the will, or wholly under the statute.

The statute, title Dower, § 10, provides, that every devise of land, or any estate therein, by will, shall bar her (the wife's) dower in lands, or of her share in the personal estate, unless otherwise expressed in the will; but she may elect whether she will renounce the benefit of such devise or bequest, and take her dower in the lands and her share in the personal estate of her husband.

Third. I hereby direct, that sufficient of my personal prop-

Under this section it was held in the cases of *Jennings v. Smith*, 29 Ill. 116, and *Brown v. Pitney*, 39 Ill. 468, that a bequest of personal property does not, of itself, like a devise of land, bar dower. The will containing nothing to show the intent, the widow may take both the personalty bequeathed and her dower. But if the will shows either by express terms, or by necessary implication from its other provisions, that the personalty is intended to be in lieu of dower, then the widow must elect between the bequest and dower.

In the case of *Deltzer v. Scheuster*, 38 Ill. 301, it was held that sec. 10 of the statute concerning dower must be construed to apply to other personal estate than her award given to her under the 48th (now 74th) section of the statute in relation to administration, and referred to sec. 50, (now 76,) in support of that opinion.

Section 15 of the same statute provides, that if a husband dies, leaving a widow, but no children or descendants of children, his widow may if she elects, have in lieu of her dower in the estate of which her husband died seized, whether the same shall have been assigned or not, absolutely and in her own right, as if she were sole, one-half of all real estate which shall remain after the payment of all just debts and claims against her deceased husband. *Provided*, that in case dower in such estate shall have been already assigned, she shall make such new election within two months after being notified of the payment of such debts and claims. This section applies to the widows of both testates and intestates. *Sturgis v. Ewing*, 18 Ill. 176; *Lessley v. Lessley*, 44 Ill. 527. It was intended to give a widow the right to elect between two different estates in realty, without disturbing her interest in personalty. If therefore such a widow elects to take under this section, she takes one-half of the real estate remaining after the payment of debts and claims, in lieu, not of dower in the real estate and her share in the personalty, but of her dower alone. *White v. Dance*, 53 Ill. 413. The widow is entitled under this section to one-half of the real estate remaining after the payment of the debts, and to her award and her share in the personalty, but not to dower in the remaining real estate; and she must claim alone under the will or altogether independent of its provisions. Therefore, when she renounces under the will, she is restored to her rights under the statute. *Lessley v. Lessley*, supra; *Boyles v. McMurphy*, 55 Ill. 236. *McMurphy v. Boyles*, 49 Ill. 110.

If a testator without lineal descendants, bequeaths to his widow a sum of money, and expressly provides in his will that such bequest shall not be in lieu of dower, but shall be in lieu of any claim which the widow may make to one-half of his real estate in fee, after the payment of debts, the widow, in such a case, could take both her dower proper and the bequest, but she could not exercise the power of substitution under the fifteenth section, and take in lieu of dower the one-half in fee and also take the bequest. *Brown v. Pitney*, 39 Ill. 468.

erty be sold at public or private sale, as my executor may

A person may make a bequest of personalty to his widow, and provide that she must accept it in lieu both of her dower in his lands and of her right to take one-half in fee under the fifteenth section; or he may provide that she may still have her dower proper, but not have one-half in fee, and while in neither case would she be barred of her right either to her dower proper or to the one-half in fee, as she might prefer, yet in the first case, if she insists upon either dower or fee, she must forego the bequest, and, in the latter case, if she insists on the one-half in fee she must forego the bequest. But, where it is said the widow will be compelled, in these contingencies, to forego the legacy, it is not to be understood that she must wholly forfeit it, but only surrender so much of it as shall be a compensation to other beneficiaries of the will who are disappointed of the testator's bounty through the assertion by the widow of her legal and independent rights. *Ibid.*

The legal meaning of the word dower is, an interest in land alone, and is so used in the statute concerning dower. *Boyles v. McMurphy*, *supra*.

Where the will makes no devise or bequest to the wife of the testator, but gives the entire property of the testator to his children, his estate, as to his wife, will be regarded intestate to the extent of her legal claims—her award and her distributive share after payment of the debts. In *re Taylor's Will*, 55 Ill. 252.

Section 76 of the statute, Tit. Administration, declares that the right of the widow to her *award* shall in no case be affected by her renouncing or failing to renounce the benefit of the provisions made for her in the will of her husband, or otherwise. If, therefore, the testator desires that his widow shall waive her right to her award, and accept only the provisions or some provision of the will, a clause may be added, as follows:

But the foregoing provisions in respect to personal estate, (or otherwise,) in favor of my said wife, are to be accepted by her only upon this express condition, that she waives her right within one year after probate of this will to the award allowed her by law as my widow; otherwise said provisions are to be void.

If it is desired that the widow take personal estate instead of dower, (see *Jennings v. Smith* and *Brown v. Pitney*, *supra*,) a clause may be added as follows:

But the foregoing provisions in respect to personal estate, in favor of my said wife, are to be accepted by her instead of dower in my lands but if not so accepted, within ——— months after probate of this will, they are to be void.

The statute in relation to Homestead Exemptions, § 1, as amended in 1873, provides that, "every householder having a family shall be entitled to an estate of homestead, to the extent in value of one thousand dollars in the farm or lot of land and buildings thereon, owned or rightfully possessed by lease or otherwise, and occupied by him or her as a residence;

deem best, to pay the expenses of administration and said funeral expenses and debts, and the legacy hereinafter specified, to H—— B——.²

Fourth. I give and bequeath unto my beloved sister, H—— B——, of the city of ——, the sum of one thousand dollars, to be paid within one year after my decease; but in case she shall not survive me,³ I give the said sum to her descendants, to be distributed in equal parts; the descendants of any deceased child or grandchild to take the share of their parent in equal parts among them.

and such homestead and all right and title therein, shall be exempt from attachment, judgment, levy on execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, *descent* and *devise*, except as hereinafter provided."

By § 2, the homestead continues after the death of the householder, for the benefit of the surviving husband or wife, so long as he or she continues to occupy the same, and of the children until the youngest becomes twenty-one years of age.

By § 4, such homestead right may be lost by abandonment by the householder; but if the exemption is continued to a child or children, it cannot be released or waived without the order of the court directing a release thereof.

We have seen that the homestead is exempt as against the laws of devise, therefore if the testator or testatrix desires to devise real estate subject to the homestead exemption, to any person except the one who would have a right to it as a homestead, it would be proper to require that a devise or bequest to the person who would be entitled to the homestead, shall be taken only on condition of releasing the homestead right within some definite time.

² If the testator directs that his estate shall not be sold, it shall be preserved in kind, and be distributed as directed by the will, unless a sale is absolutely necessary, to pay debts and charges against the estate. Stat. Tit. Admin. § 92. And if the sale is not necessary for these purposes, or for the proper distribution of the effects of the estate, the court may order that the property may be preserved and distributed in kind. Ib. § 93.

³ It will be observed that the legacy to H. B. would lapse, and the legacy go into the residuary estate, if the testator survived her, unless provision were made that it should go to some other person. So if the legacy run to her and her "heirs," it would not in general go to her children or heirs, but would lapse. 2 Redf. Wills, § 8, pl. 1, 2. If the word "issue" is used instead of "descendants," the last clause of the text should also be used.

Fifth. I give and devise to my beloved son, J—— B——,⁴ the farm on which he now resides, lying in —— county, in the state of ——, being the (here describe the tract).

Sixth. I give and bequeath to my beloved daughter, Mary Styles, the following tract of land lying in the county of (here describe the land); to have and enjoy the use thereof during her life, and upon her death to be divided in equal parts among her children. And I give and bequeath to my said daughter, the income from ten shares of stock now owned by me in the First National Bank of ——. But the said stock itself I give and bequeath to such of her children as may survive her.

Seventh. I give and bequeath unto the Illinois Industrial University one thousand dollars, to be paid within two years after my death.

Eighth. Upon the death of my said wife, or upon my own death, in case I survive her, I give and devise the tract of land above devised to her, unto my said son and daughter, to be divided in equal parts between them; and in case I survive my said wife, I give and bequeath unto my said son and daughter all of my personal estate of every nature whatsoever, remaining after the payment of the said legacies, to be divided in like manner between them. And I direct that in case my said son and daughter cannot agree upon a division of the last mentioned land and personal estate between them, my executor shall sell the same within six months after request in writing by either of them, at public or private sale, and for cash in hand or upon credit, as he shall deem best, and divide such of the proceeds as remain after paying costs of the sale, between my said son and daughter.

⁴ It is not necessary that the words "and his heirs" be inserted here in order to give the devisee a fee simple estate of inheritance. If a less estate is intended, words showing that intent must be used. See Stat. Tit. Conveyances, § 13. Furthermore, when the devisee or legatee is a *child or grandchild* of the testator, and dies before the testator, the devise or legacy will go to the issue of the devisee or legatee unless there is a provision in the will for such contingency: but if there is no such issue at the time of the testator's death and no such provision, the estate devised or bequeathed is treated as intestate estate. See Stat. Tit. Descent, § 11.

Ninth. All the residue of my lands not herein devised, I give and devise unto my said son and daughter, to be divided in equal parts between them, or sold by my executor, and the proceeds divided in equal parts between them, as directed in the *eighth* clause of this will.

Tenth. I hereby constitute and appoint my said wife, F—B—, executrix of this will, and direct that she may not be required by the county court to give any bond as such executrix.⁵ But in case my said wife shall fail or refuse to become such executrix, I hereby constitute and appoint my trusty friend, R—S—, the executor of this will.

Eleventh. Having heretofore entered into contracts, and may hereafter do so, with divers individuals, to convey to them certain lands owned by me, upon certain conditions stipulated in such contracts, which lands may remain unconveyed by me at my death, I hereby authorize my executor to convey all such lands to the respective purchasers, upon the performance by them of the conditions specified in such contracts to be performed on their part.

Twelfth. I hereby authorize my said executrix to compound or allow time for the payment of any debt due to my estate, whether supported by strictly legal evidence or not; and to settle all accounts between me and any person or persons, as my said executrix shall in her discretion think expedient; and to refer any matters in difference relating to my affairs to arbitration.

And I hereby revoke all former wills by me made.

⁵ See Stat. Tit. Administration, §§ 7, 8.

⁶ Persons of the age of seventeen years, of sound mind and memory, may be appointed executors: but if the executor so appointed is, at the time of proving the will, under twenty-one years of age, or of unsound mind, or convicted of any crime rendering him infamous, administration with the will annexed may be granted to another during his minority or other disability, unless there is another executor who accepts the trust, in which case the estate shall be administered by such other executor, until the minor arrives at full age or the other disability is removed, when, upon giving bond as in other cases, he may become joint executor with the former. When a married woman is executrix, her husband may give bond with her for her faithful performance of the trust, as in other cases. Stat. Administration, § 3.

In witness whereof I, A—— B——, have hereunto set my hand,⁷ the —— day of ——, 187—. A—— B——.

The foregoing will was signed by the said A—— B——, in our presence, and attested by us in his presence.⁸

J—— C——.
R—— F——.

Or, the attestation may be as follows :

The signature to the foregoing will of the said A—— B—— was acknowledged by him in our presence to be his act and deed, and we have attested the same in his presence.

J—— C——.
R—— F——.

Or:

The name of the said A—— B—— was in our presence signed to the foregoing will, by O—— R——, in the presence and by the direction of said A—— B——, in whose presence we have signed our names as witnesses thereto.

J—— C——.
R—— F——.

But if it should be uncertain in what state probate of the will might be granted, in order to meet any peculiarity in the laws of any other state or country, the following form may be adopted and a wax or wafer seal used by the testator :

Signed, sealed, published and declared by the said A—— B——, as and for his last will and testament, in the presence of us who, in his presence, and in the presence of each other, and at his request, have subscribed our names as witnesses thereto.

J—— C——.	} (Here state the residence of each witness.)
R—— T——.	
F—— H——.	

⁷ The statute does not require a seal, but see ante, § 35 n. in case it is executed under a power contained in another instrument.

⁸ No attestation clause being necessary, as we have seen, ante, § 42, yet it is advisable to affix one reciting the facts as they occurred, and as fully as the statute requires them to be proved by the attesting witnesses, for in case of their death, the attestation would afford ground for belief that the will was really executed as required by the statute.

NOTE.—It will be obvious to all that in the selection of witnesses, those of intelligence and respectability should be preferred; because their attestation of the will by a formal clause of attestation, tends very strongly to show that all of the formalities therein enumerated were duly complied with. And it is of great importance that witnesses residing in towns and cities especially, should be permanent inhabitants, and their residence well known.

It must also be borne in mind that the witnesses should not be persons who are to take any benefit under the will, as, provisions in their favor would be void, unless there should be the requisite number of other witnesses having legal qualifications. See ante, § 46.

FORM NO. 2.

§ 211. Proceed as before to the second item. Ante, § 210.

Second. After payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved wife, F—— B——, the farm on which we now reside, lying in the county, etc. (here describe the land), during her life, and all of the cattle, horses, sheep and hogs by me owned and kept thereon: also all the household and other articles of personal property not here enumerated, or otherwise disposed of in this will, during her life, after having disposed of a sufficient amount thereof to pay the expenses and debts aforesaid; and upon her death, all the personal property above bequeathed and remaining unexpended by her or in payment of her funeral expenses and debts, I bequeath to my beloved son, J—— B——.

Third. I give and devise unto the said J—— B——, the farm on which he now resides (describe it). subject to the payment by him of my mortgage thereon to W—— R——.⁹

⁹“Subject to the payment by him of *my* mortgage thereon, etc.” If some such provision were not made, where the incumbrance is created by the testator, or his ancestor, his personal estate would be liable for its payment, and the devisee would take with the right to have the incumbrance discharged out of the personal estate of the testator. But where the incumbrance was created by the grantor of the testator, and the testator has not assumed by contract with the owner of the incumbrance personally and directly to discharge the same, the devisee will take subject to the incumbrance, and must discharge it himself unless the will otherwise provides. 3 Redf. Wills, § 43 pl. 26, 27, 28.

Fourth. I hereby constitute and appoint my said wife, F—— B——, executrix of this will, and request that she may not be required to give bond for the discharge of her duties as such executrix.

Lastly, I hereby revoke all former wills made by me.

(Conclude as in the first form, ante, p 103.)

FORM NO. 3.

Begin as before, ante, § 210.

§ 212. *Second.* I give, devise and bequeath unto my beloved wife, F—— B——, all my remaining estate, both real and personal, in whatever it may consist, or wherever situated, at the time of my decease, to be by her used and disposed of, during her natural life, precisely the same as I myself might do if living; and to distribute the same by gift, or otherwise, among my children at any time during her life, as to her shall seem meet and proper; and to appoint the same among my said children by will, after her decease, according to her own judgment and discretion.

Third. But if any of my said estate shall remain undisposed of by my said wife, at the time of her decease, I give, devise, and bequeath all such residue and remainder of my said estate, to be equally divided among my children who shall be living at that time, and the issue of any child who may have then deceased; such issue taking the share to which such deceased child would be entitled, if living.

Fourth. But I hereby direct, that the share of any of my daughters, who shall be then living, shall not absolutely vest in any such daughter, but her share shall be retained by my executors and trustees for the time being, whether appointed by me, or by the proper tribunals of the state, and put at interest or upon rent, and only the income thereof paid to my said daughters, or any of them, during their natural lives, and after their decease, the whole shares of such daughters or either of them, to be equally distributed among their and each of their lawful heirs, according to the laws of this state. And

I hereby appoint C — D — and E — F —, of, etc., trustees of my will; and I appoint my said wife, F — B — and the said C — D — and E — F — executrix and executors of my will. In witness whereof, etc. (Conclude as in Form No. 1, ante, p. 103.)

NOTE. The father of a child likely to be born, or of any living child, being a minor and unmarried, may, by his last will, dispose of the custody and tuition of such child, to continue during its minority, or for a less time. But no such will can deprive the mother, during her life, of the custody and tuition of the child, without her consent, if she be a fit and competent person to have such custody and tuition. And a mother being sole, or surviving the father of her child, may, in like manner, dispose of the custody and tuition of such child. Statute, title, Guardians and Wards, § 5. And the guardianship of the infant's estate may be appointed to one, and the custody and tuition of the minor to another. *Ibid*, § 6. The statute provides in these cases for a bond to be given by such guardian where he has control of such minor's estate, and declares each guardian's powers and duties to be the same within the scope of his appointment, as a guardian appointed by the court. §§ 7, 8. He must be commissioned by the county court, and give bond, unless merely appointed for the custody and tuition of the minor. But if the testator in his will requests that a bond be not required, no such bond will be required, unless the court shall deem it necessary. § 9.

Of course the will may direct the place and extent of the minor's education.

When a testator desires to have his property controlled by a trustee and the profits used for the support of a relative or friend, or for the benefit of an institution, or the like, it is usual to will the estate to some person upon trusts specified in the will, and in the same instrument create him executor, or appoint some one else executor. This is often done where the beneficiary is of dissipated habits or unsound mind, or for any cause, unable or unfit to manage the estate.

In such cases the trustee is often empowered to sell or mortgage real and personal property, and with the proceeds to pay debts or purchase stocks, or loan such proceeds upon specified securities, and apply the income to the payment of annuities or other purposes, and upon the happening of a specified contingency, to convey the property or distribute the stocks and securities as may be directed in the will. It is usual also to exempt the trustee from liability for losses occurring without his own willful default, and authorize him to retain all expenses incidental to the trusteeship.

There may also arise contingencies in which it would be advisable to apply a portion of the corpus of the fund committed to trustees towards

the support or the settlement in life of the beneficiaries. Unless there is power given for this the trust might fail to accomplish the testator's design.

It is also advisable to provide for the appointment of another trustee in case of his death or refusal to serve.

It will be perceived upon a moment's reflection, that a will involving these questions should not be prepared hastily nor by an unlearned and unskilled hand.

It would be well in many cases, before determining the language to be used to examine chapter 43 concerning lapsed legacies.

FORM No. 4.—CODICIL.

§ 213. Whereas, I, A—— B——, of the county of ——, and state of ——, did make my last will in writing, bearing date the —— day of ——, 187—, and did thereby provide (here set forth the provision proposed to be changed). Now instead of said provision I hereby give, devise, etc.

And I hereby declare this to be a codicil to my said last will.

In witness whereof, etc. (Conclude and sign and have the attestation made in the same form, and by the same number of witnesses as a will, ante, p. 103.)¹⁰

FORM No. 5.—NUNCUPATIVE WILL.

§ 214. The following is the will of A—— B——, of, etc., made by him at, etc., during his last sickness; that is to say, on the 2d day of May, 1872. And the same was made by him in the presence of us, whose names are hereunto subscribed as witnesses, and who heard him pronounce the following words, and at the same time request us to bear witness that such was his will (or whatever he said to that effect).

He said, "I give my silver watch to John Brown, and my surveyor's compass and chain to Geoffrey Styles (detailing each particular.)

All the rest I give to my wife; she may be my executrix."

¹⁰ Though not absolutely necessary, it would be often a saving of expense and trouble, to have the same witnesses to the codicil who attested the will.

Done in the sick chamber of the said A—— B——, on the day and year aforesaid (or, The foregoing will was reduced to writing and signed by us, as witnesses thereto, on the 5th day of May, 1872); the said A—— B—— having died on the 4th day of May, 1872 (or of the same year).

O—— R——, }
M—— S——. } Witnesses.

NOTE. The statute requires nuncupative wills to be reduced to writing within twenty days after the making thereof, and also within ten days after the death of the testator, and that the last fact shall be proved by two disinterested witnesses other than those whose names are signed to the same. See ante, § 56, and see *Arnett v. Arnett*, 27, Ill. 247, as to the testator's request to the witnesses. See *Harrington v. Stees*, 6 Leg. News, 311.

CHAPTER XVII.

OF THE ISSUING OF LETTERS TESTAMENTARY.

§ 216. Letters testamentary to be issued to the executor named in the will.

Who next entitled thereto.

217. What evidence of executor's refusal to serve necessary.

218. Where executor named in the will is a minor, when the will is proved, or convicted of crime, or part of the executors only accept or are competent, who will be appointed.

219. Minority, death or disqualification of the executor should appear of record, and the widow, next of kin or creditors may be appointed.

220. The conviction of what crimes disqualifies.

221. An affidavit showing the death of the testator, and all other pertinent facts, should be filed with the clerk.

222. Executors and administrators with the will annexed, to take and subscribe an oath.

223. And give bond.

224. Testators may by directions in the will dispense with the bond.

225. Form of letters testamentary.— Copy of the will to accompany the letters.

226. Power of executor over testator's estate, before probate of will.

226a. Duties of administrator with the will annexed the same as those of the executor, except in cases of trust conferred on the latter.

§ 216. The will having been properly proved, the next step for the court is, to make an order directing the issue of letters testamentary thereon to the person named in the will as executor, if he is legally competent, and accepts the trust, and gives bonds to discharge the same; but when there is no executor named in the will, or he dies, refuses to act, or is otherwise disqualified, the court must commit the administration of the estate to the widow, surviving husband, next of kin or creditor, the same as if the testator had died without leaving a will.¹

§ 217. The person named in the will as executor, if he is legally competent, has a right to administer, and he can only be deprived of this right by his refusal to accept the executorship; and such refusal should be evidenced by some statement entered of record.² The proper practice would be to require his refusal to be in writing, where that is practicable, and filed with the court; but this is not absolutely essential. The court should be satisfied of the *refusal* by some sufficient evidence, and that fact should be entered of record.³ The principal danger arising from a neglect to make the refusal a matter of record, would occur where two or more executors are named in the will, and are empowered to sell real estate. In such case they must all join in the conveyance, or it will not be good. But if a part of them "refuse" to become executors, those who accept the executorship and qualify, can make a valid conveyance.⁴ So, if they "fail," under § 97 of the law of 1872.

§ 218. Persons of the age of seventeen years, of sound mind and memory, may be appointed executors; but when a

¹ Stat. Administration, § 1. See post, § 533, as to who are next of kin. Refusal to act, see Form No. 5. Form of Letters No. 7.

² Sponsler's Est. 12 P. F. Smith, Pa. And see post, § 441.

³ Clinefelter v. Ayres, 16 Ill. 329; ib. 20, Ill. 465; Wardwell v. McDowell, 31 Ill. 364. These cases arose out of the same will. The first was decided without reference to the act of March 4, 1867, Session Laws, 179; but which was repealed; and the two latter cases were decided upon the peculiar provisions of that act. But we think they sustain the text. It would not be sufficient if the record showed that the executor named "declined" to act. Ibid.

person appointed executor is, at the the time of proving the will, under the age of twenty-one years, or of unsound mind, or convicted of any crime rendering him infamous, administration with the will annexed may be granted during his minority or other disability, unless there is another executor who accepts the trust; in which case the estate shall be administered by such other executor until the minor arrives at full age, or the other disability is removed, when, upon giving bond, as in other cases, he may be admitted as joint executor with the former.⁴ And where two or more executors are appointed by the will and one or more of them dies, refuses to take upon himself the executorship, or is otherwise disqualified, letters testamentary will be granted thereon to the other person or persons so named, not renouncing (refusing) as aforesaid, and not disqualified.⁵

§ 219. Where the executor named in the will is a minor, or dies, or is disqualified, that fact should be made to appear to the court by sufficient proof, and be set forth in the record. And in such cases, as well as where he refuses to accept the executorship, if there is no other executor who accepts the trust, the priority of right of the widow or surviving husband over the next of kin, and the next of kin over creditors and of creditors over others, to administration continues the same length of time as in case of intestate estates.

§ 220. Those crimes the conviction of which render a person infamous, are declared by the statute, title Criminal Jurisprudence, § 174, to be rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy or the crime against nature, incest, larceny, forgery, counterfeiting and bigamy.

§ 221. Though the statute does not expressly require it, as it does in cases of administration (see sec. 20), the court requires, before letters testamentary will be issued, that there shall be filed with the clerk an affidavit of the person applying for the same, or some other credible person, setting forth, as

⁴Stat. Administration, Sec. 3.

⁵Ib. § 5. See *Wisdom v. Becker*, 52 Ill. 342.

in cases of intestates as near as may be, the date of the death of the deceased, the probable amount or value of the personal estate, and the names of the heirs and widow or surviving husband, if known. This will enable the court to determine the amount of the executor's bond, and inform the court of the existence of the widow, surviving husband, or next of kin, and enable it while administration is proceeding, to keep their rights in view. And in case the executor named in the will is disqualified to act, such other facts may be set forth as would enable the court to determine who is entitled to letters of administration with the will annexed.⁶

§ 222. Section 6 provides that, every executor, or administrator with the will annexed, shall at the time of proving the will and granting letters testamentary, or of administration, take and subscribe the following oath (see Form No. 9) to be administered by the clerk of the county court, and to be attached to, and form a part of the probate of the will.

§ 223. Section 7 provides that, the executor named in the will, or the administrator with the will annexed, shall, before entering upon his duties, enter into bond with sufficient security, to be approved by the court, in a sum double the value of the estate, and payable to the people of the state of Illinois, for the use of the parties interested, in the following form (see Form No. 8); which bond must be signed and sealed by the executor or administrator, and his securities, and filed in the office of the clerk and recorded. And section 3 provides that, when a married woman is executrix her husband may give bond with her, for her faithful performance of the trust as in other cases. It is proper to observe that the strictest care should be taken to make the bond conform in every respect to the statute, otherwise it might prove to be worthless.⁷

⁶ Letters of administration though irregularly granted, by a court having jurisdiction of the person, cannot be questioned collaterally. *Wight v. Wallbaum*, 39 Ill. 355; *Duffin v. Abbott*, 48 Ill. 17. And a writ of error will not lie to the supreme court to review the propriety of the action of the county court in granting letters of administration. *Hobson v. Paine*, 40 Ill. 25; *Schnell v. City of Chicago*, 43 Ill. 382.

⁷ No case appears to have been decided by the supreme court of Illi-

§ 224. Section 8 provides that, when a testator leaves visible estate more than sufficient to pay all of his debts, and his will directs that his executor shall not be obliged to give security, no security shall be required, unless the court sees cause, from its own knowledge, or the suggestions of creditors and legatees, to suspect the executor of fraud, or that the personal estate will not be sufficient to pay the debts; in which case the court may require security, and such security shall be given before or after letters testamentary are granted, notwithstanding directions to the contrary in the will.

§ 225. The statute, title Administration, § 10, prescribes the form of letters testamentary (see Form No. 10), and § 1 directs that in every case a copy of the will shall go out with the letters.

§ 226. The power of the executor over the testator's estate, before probate of the will and obtaining letters testamentary, extends to the burial of the deceased, the payment of necessary funeral charges, and the taking care of the estate; but in such cases, if the will is rejected when presented to probate, and such executor thereby never qualifies, he shall not be liable as an executor of his own wrong, unless, upon refusal to deliver the estate to the person authorized to receive the same: *Provided*, that this section shall not be construed to exempt any person claiming to be executor, as aforesaid, for any waste or misapplication of such estate.⁸ The right of the party claiming under the will, arises out of and by the will, and when it is probated, the proof is thereby created of this right,—which vested at the death of the testator—the probate not conferring, but being merely evidence of the right.⁹

§ 226a. In general, the duties of the executor wholly devolve upon the administrator with the will annexed, so far as they pertain to the settlement of the estate; but it seems in all cases where there is a trust connected with the power in the executor,

nois, involving this question. But the decisions in other states are not uniform. See on this subject 3 Redf. Wills, § 8, where cases are collected.

⁸ Stat. Admin. § 4.

⁹ Shepard v. Carriel, 19 Ill. 313.

it cannot be performed by such administrator.¹⁰ Therefore a power given by the will to the executor to sell real estate cannot be executed by the administrator with the will annexed, since the power of the latter is regarded as limited to the administration of the personalty.¹¹ But this rule only applies to cases where the power is connected with a special and personal trust in the executor.¹² Where, beyond the duties of settlement and distribution of the estate, the executor is charged by the will with special trusts, which are of longer duration and more strictly personal, these should be devolved upon a trustee specially appointed for that purpose by the court of chancery.¹³

CHAPTER XVIII.

ADMINISTRATORS TO COLLECT.

§ 227. When the statute requires administrators to collect to be appointed.

228. To give bond — to have letters of administration.

229. To take an oath.

230, 231. Powers and duties.

232. Where another administrator is appointed, his duties, liabilities and compensation.

§ 227. The statute, title Administration, § 11, provides that, during any contest in relation to the probate of a will or codicil, before the same is recorded, or until a will which may have once existed, but is destroyed or concealed, is established, and the substance thereof committed to record, with proof

¹⁰ *Dominick v. Michael*, 4 Sandf. 374; *LeFort v. Delafield*, 4 Edw. Ch. 32.

¹¹ *Conklin v. Edgerton*, 21 Wend. 430. See also *Gilchrist v. Rea*, 9 Paige, 66; *Matter of Place*, 7 N. Y. Leg. Obs. 217. This was so held in *Conklin v. Edgerton*, notwithstanding the statute of New York, in terms, gives him the same powers conferred upon the executor.

¹² *Matter of Anderson*, 5 N. Y. Leg. Obs. 302.

¹³ *Farwell v. Jacobs*, 4 Mass. 634.

thereupon taken; or during any contest in regard to the right of executorship or to administer the estate of any person dying either testate or intestate; or whenever any other contingency¹ happens which is productive of great delay before letters testamentary or of administration can be issued upon the estate of such testator or intestate, to the person or persons having legal preference to the same, the court may appoint any person as administrator, to collect and preserve the estate of any such decedent, until probate of his will, or until administration of his estate is granted, taking bond and security for the collection of the estate, making an inventory thereof, and safe keeping and delivering up the same when required so to do by the court, to the proper executor or administrator, whenever he shall be admitted and qualified as such. (See post, § 252.)

§ 228. Section 13 provides that, before letters of administration to collect shall be granted, the person so appointed shall give bond, with sufficient security, to be approved by the court, and sets forth the form of such bond (see Form No. 12), which bond must be signed and sealed by the administrator and his securities, and filed with the clerk of the court and recorded. And section 12 sets forth the form of letters of administration in such cases. (See Form No. 13.)

§ 229. Section 14 provides that, before an administrator to collect shall enter upon the duties of his appointment, he shall take and subscribe an oath or affirmation before the clerk of the county court, which oath shall be filed in the office of the clerk of the court before whom the same is taken. (See Form No. 11.)

§ 230. The powers and duties of an administrator to collect are set forth in sections 15, 16 and 17. Section 15 provides that, every collector so appointed shall have power to collect the goods, chattels and debts of the deceased, according to the tenor of such letters, and to secure the same at such reasonable and necessary expense as shall be allowed by the court; and the court may authorize him immediately after the inventory and appraisal of such estate, to sell such as are perishable or may depreciate by delay, and to account for the same;

¹ As to the duty of the public administrator in such cases, see post, § 252.

and for the whole trouble incurred by such collector, the court may allow such commission on account of the said personal estate actually collected and delivered to the proper executor or administrator, as the court may deem just and reasonable : *Provided*, the commission shall not exceed six per cent. on the whole amount stated in the inventory or bill of appraisement.

§ 231. Section 16. Every such collector may commence suits for debts due to the decedent, and release the same on payment thereof; and no such suit shall abate by the revocation of his letters, but the same may be prosecuted to a final decision, in the name of and by the executor or administrator to whom letters testamentary or of administration may be granted.

§ 232. Section 17. On the granting of letters testamentary or of administration, the power of such collector shall cease, and it shall be his duty to deliver on demand, all property and money of the deceased which shall have come to his hands or possession, saving such commission as may be allowed by the court as aforesaid, to the person or persons obtaining such letters; and in case any such collector shall refuse or neglect to deliver over such property or money to his successor, when legal demand is made therefor, such person so neglecting or refusing shall be liable to pay twenty per cent. over and above the amount of all such property or money as comes to his hands by virtue of his administration, and is not paid or delivered over as aforesaid, and shall forfeit all claim to any commission for collecting and preserving the estate; which said twenty per cent., together with all damages which may be sustained by reason of the breach of any bond which may be given by any such collector, may be sued for and recovered by the person or persons to whom letters testamentary or of administration may be granted, for the use of the estate of such decedent.

CHAPTER XIX.

FOREIGN EXECUTORS AND ADMINISTRATORS.

§ 233. Their rights and duties.

§ 233. The statute, title Administration, § 42, provides that, when any person has proved a will and taken upon himself the execution thereof, or has obtained administration of the estate of an intestate in any state in the United States, or in any territory thereof, such person may prosecute suits¹ to enforce claims of the estate of the deceased, or sell lands to pay debts, in any court in this state, in the same manner as if letters testamentary or of administration had been granted to him under the provisions of the laws of this state: *Provided*, that such person shall produce a copy of his letters testamentary or of administration, authenticated in the manner prescribed by the laws of congress of the United States for authenticating the records of judicial acts, in any one state, in order to give them validity in other states:² *And, provided*, that such executor or administrator shall give a bond for costs, as in case of other non-residents. And section 43 provides, that nothing contained in the preceding section shall be so construed as to apply to cases where

¹ Under statute of 1845, from which this was copied, it was held that foreign administrators have the power to sue out an execution on a judgment rendered in favor of the intestate in his lifetime. *Keefer v. Mason*, 36 Ill. 406.

² The act of congress relating to this subject was approved May 26, 1790, and provides in section 1, "that the records and judicial proceedings of the courts of any state shall be admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." This statute embraces courts of probate and chancery, as well as courts of common law. 1 Gr. Ev. § 505. By act of congress, Mar. 27, 1804, the provisions of this act are extended to the territories of the United States and the District of Columbia.

administration is obtained upon the estate of any intestate nor where letters testamentary are granted in this state; and where, after any suit is commenced by any administrator or executor under the provisions of the preceding sections, and before final judgment thereon, administration is had, or execution undertaken within this state, under the laws of the same, upon the estate of any decedent, upon suggestion of such fact, entered of record, the said resident administrator or executor shall, upon motion, be substituted as party to such suit; and thereupon the court shall proceed to hear and determine the same, as if it had been originally instituted in the name of the said resident executor or administrator, and the benefits of the judgment, order or decree shall enure to him, and be assets in his hands.

By sec. 1 of the act of 1853, p. 239; Gro. Stat. p. 828, § 192, it is provided that, when any non-resident, executor or executors shall have proved the last will and testament of any deceased person, and taken on him or them the execution of such will in any state, district or territory of the United States, such non-resident, executor or executors shall be authorized to execute such will in this state in the same manner as though such executor or executors had qualified in this state: *Provided*, that before such executor or executors shall sell, dispose of or convey any real estate in this state, he or they shall produce such will or a copy thereof, and of the letters testamentary, or other authority to execute the same, under the seal of the court or proper officer where such will was proved or admitted to probate, and of such letters or authority granted, accompanied by the certificate of the judge or clerk of said court or other proper officer, that such letters or authority had been granted in pursuance of or agreeably to the laws of the state, district or territory in which such letters, testamentary or authority were granted and filed, and have the same recorded in the county court of the county in which the property or some part thereof, of which the testator died seized may be situated, and the county judge of such county shall certify that such will was

duly authenticated under the provisions of this act: *Provided, further*, that said county judge shall require bond from such non-resident executor or executors, or some responsible person in their behalf, to the people of the state of Illinois, in such penalty as such judge shall deem necessary, for the faithful appropriation of the effects of such testator in this state, and for the application of the proceeds thereof, in the first instance, to the payment of all such debts, if any, as may be allowed by such court against the estate of such testator, within two years from the filing of such bond; and this provision shall be incorporated in the condition of the bond herein provided for. And such bond shall be signed by some responsible person in this state either as principal or surety, to be approved by said court.

Section 2 provides that, the acts of non-resident executors heretofore had in selling or conveying any real estate in this state, may be approved and confirmed by the county court of any county where such real estate may be situated, upon petition by any person interested therein, sixty days' notice being given by publication in a newspaper published in such county — and if no paper be published in such county, then in some newspaper published in the nearest county to that where such real estate may be situated — of the intention to present such petition, and the time and place of such presentation; and upon such approval and confirmation, such sales and conveyances heretofore made shall be as valid and effectual as if made under the provisions of this act. But before such court shall give such approval or confirmation, it shall require and receive satisfactory evidence that such sales or conveyances were made in good faith, and that the interests of creditors in this state shall not be prejudiced by such approval or confirmation.

Section 3 provides that, appeals may be allowed from the order of said court approving and confirming such sales and conveyances, as in other cases, by any person who may claim an interest in the premises thus sold or conveyed.

Section 4 provides that, the provisions of this act shall not apply to any case where letters of administration shall have

been granted upon the estate of such testator in this state, unless such letters shall first be revoked or the administrator shall die or resign.

By the act of 1869, p. 7; Gro. Stat. p. 829, § 196, it is provided that, foreign administrators, with the will annexed, shall have the same right to bring suits in this state as is now, or may be, conferred by law upon foreign administrators and executors; and that any foreign administrator, with the will annexed, shall in all things be governed, in bringing any suits in this state, by the law governing foreign executors and administrators suing in this state.

CHAPTER XX.

APPOINTMENT OF ADMINISTRATORS.

- § 234. In what county to be appointed.
- 235. Proof of death and other facts to show jurisdiction of the court.
- 236. Lapse of seven years after death a bar to granting of letters.
- 237. Who entitled to letters of administration.
- 238. Public administrators appointed in certain cases.
- 239. The order in which persons are entitled to administration.
- 240. Relinquishment of persons having a prior right to administer.
- 241. 242. Oath and Bond.
- 243. Bonds where form not prescribed by statute, how made.
- 244. Two or more administrators may give joint or separate bonds.
- 245. How bonds of the personal representative may be prosecuted.
- 246. Courts of equity have jurisdiction in certain cases.

§ 234. The statute does not direct where administration of intestate estates shall be granted, but does in case of testate estates. (See ante, § 134.) The general rule is however, that the jurisdiction of every thing pertaining to the administration of estates is primarily in the county court of the county where the intestate had a mansion house or known place of residence at the time of his decease.¹ If he was a non-resident and

¹ 3 Redf. Wills, § 2, pl. 1.

left only lands, administration should be granted in the county where such lands or a part thereof are situated;² and if he left only personal estate, administration would properly be granted in the county where the same or a part thereof is situated. If the deceased had no known place of residence, and no lands in the state, administration might properly be granted in the county where he died or wherein his personal property is situated.

§ 235. The first step to be taken after the death of the intestate, by the party proposing to administer upon the estate, is to make satisfactory proof before the proper county court, that the person on whose estate letters of administration are requested is dead.³ And such letters shall not be issued until the applicant therefor, or some credible person, shall make and file an affidavit with the proper clerk, setting forth, as near as may be the date of the death of the deceased,⁴ the probable amount or value of the personal estate, and the names of the heirs and widow, or surviving husband, if known.⁵ And such other facts, like the residence, place of death, where the deceased had property situated, etc., may be set forth, as would be necessary to give the court jurisdiction of the administration. (See Form of Letters No. 19, and note.)

§ 236. The lapse of seven years after the death of the decedent constitutes a bar to granting letters of administration, but it may be removed by showing circumstances which prevented an earlier application; as that the death was not known.⁶

§ 237. The statute, title Administration, § 18, provides, that administration shall be granted to the husband on the goods and chattels of his wife, and to the widow or the next of kin to the intestate, or some of them, if they will accept the same,

² Bowles v. Rouse, 3 Gilm. 409.

³ Stat. Admin. § 18.

⁴ See this subject, ante, §§ 137-141.

⁵ Stat. Admin. § 20. See Langworthy v. Baker, 23 Ill. 484, and Schnell v. City of Chicago, 38 Ill. 384. Form of Petition No. 14.

⁶ Fitzgerrald v. Glancy, 49 Ill. 465. As to when death will be presumed, see ante, 139.

and are not disqualified; but in all cases the widow shall have the preference; and if no widow or other relative of the intestate applies within sixty days from the death of the intestate, the court may grant administration to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days, as aforesaid, administration may be granted to any person whom the court may think will best manage the estate. In all cases where the intestate is a non-resident, or without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county.

* * * Provided, that no non-resident of this state shall be appointed administrator, or allowed to act as such.⁷

§ 238. The same statute, section 46, provides for the appointment of the public administrator, to administer upon real estate in certain cases. (See post, § 247.)

§ 239. The persons entitled to letters rank in the following order: 1. The surviving husband or widow. 2. The next of kin. 3. Creditors. The next of kin would probably be determined by the rules of descent specified in the statute, title Descent, § 1, clause 5; for the aim of the law seems to be to give administration in all cases to those in some way interested in the estate, either as heirs or creditors, in preference to others. The next of kin would therefore be, 1. The children,⁸ and their descendents. 2. The father or mother. 3. The brothers and sisters. 4. The children of brothers and sisters.⁹ This is as far as this branch of the inquiry could profitably go. Creditors are those to whom the deceased was indebted. And any person having a cause of action against him which survives, is re-

⁷ See *Child v. Gratiot*, 41 Ill. 315. A surviving partner should never be appointed administrator on the estate of a deceased partner, because as such survivor he becomes accountable to the estate and could not well account with himself. *Heward v. Slagle*, 51 Ill. 336.

⁸ The issue of a void marriage have no right to administer on the estate of their deceased father. *Myatt v. Myatt*, 44 Ill. 473. And having no right to administer, would have no right to apply for revocation of letters of administration. *Ib.*

⁹ 3 Redf. Wills, § 7, pl. 8.

garded as a creditor, otherwise not. Hence the promisee, in a contract of marriage, cannot be regarded as a creditor of the promisor within the statutes regulating the granting of letters of administration.¹⁰ Letters must be revoked where they have been granted upon a false and fraudulent pretense of being a creditor of the estate, or upon any other fraudulent pretense whatever.¹¹

§ 240. Section 19 provides that, letters of administration upon the estate of an intestate shall not be granted to any person, not entitled to the same as husband, widow, next of kin, creditor or public administrator, within seventy-five days after the death of the intestate, without satisfactory evidence that the persons having the preference have relinquished their prior right thereto; but if application is made after the expiration of seventy-five days, the court may grant letters to the applicant or any other person, as he may think fit.¹² This includes the power to appoint the public administrator.¹³

§ 241. It is the duty of the court upon granting administration, to require each administrator, public administrators excepted, to take and subscribe an oath to be filed with the clerk of the court,¹⁴ in substance following. (See Form No. 17.)

§ 242. Each administrator must before entering upon the duties of his office, enter into bond, with sufficient security, to be approved by the court, in a sum double the value of the estate, payable to the people of the state of Illinois, for the parties interested, substantially in the following form (see Form

¹⁰ Stebbins v. Palmer, 1 Pick. 71; Smith v. Sherman, 4 Cush. 408. See Stat. Tit. Admin. § 123. But neither husband or wife is next of kin to the other. Townsend v. Radcliffe, 44 Ill. 446.

¹¹ Stat. Admin. § 26; post, § 253. See Form No. 19.

¹² See Form of Relinquishment, No. 15, and Form of Clerk's Entry, No. 16. The appointment of an administrator by the proper court cannot be questioned in a collateral proceeding. Duffin v. Abbott, 48 Ill. 17; Wight v. Wallbaum, 39 Ill. 563. But may on appeal or *error*, Schnell v. City of Chicago, 38 Ill. 382. This point on *error* was held otherwise in Paine v. Hobson, 40 Ill. 25.

¹³ Schnell v. City of Chicago, *supra*. And see this case as to the effect of an irregular appointment of administrators both as to time and person.

¹⁴ Stat. Tit. Admin. § 22.

No. 18), which bond must be signed and sealed by the administrator and his securities, attested by the clerk and filed in his office.¹⁵

§ 243. In all cases where bonds shall be taken from an administrator *de bonis non*, or in any other case where a form is not prescribed in the act in relation to administration, the same shall be made, as nearly as may be, in conformity with the form last prescribed, with variations to suit each particular case.¹⁶

§ 244. When two or more persons are appointed executors or administrators of the same estate, the court may take a separate bond with sureties from each, or a joint bond with sureties from all.¹⁷

§ 245. Bonds given by any executor or administrator, either with or without the will annexed, or *de bonis non*, to collect, or public administrator, may be put in suit and prosecuted against all or any one or more of the obligors named therein, in the name of the people of the state of Illinois, for the use of any person who may have been injured by reason of the neglect or improper conduct of any such executor or administrator; and such bond shall not become void on the first recovery thereon, but may be sued upon, from time to time, until the whole penalty shall be recovered: *Provided*, that the person for whose use the same is prosecuted, shall be liable for all costs which may accrue in the prosecution of the same, in case the plaintiffs fail in their suit; and certified copies of all such bonds, under the seal of the clerk of the county court, shall be received as evidence to authorize such recovery in any court of law or equity of competent jurisdiction.¹⁸

§ 246. In *People v. Lott*, 27 Ill. 215, it was held that when administrators have given several bonds, and there is a compli-

¹⁵ Stat. Tit. Admin. § 23. See Form No. 18.

¹⁶ *Ibid*.

¹⁷ Stat. Admin. § 24.

¹⁸ Stat. Tit. Admin. § 25. Several actions may be maintained on an administrator's bond. *People v. Randolph*, 24 Ill. 324. And for pleadings on a suit on a bond where a co-obligor is dead, *Cummings v. People*, 50 Ill. 132.

cation of interests, resulting from the death of one of the administrators, and of some of the sureties, whose legal representatives cannot be made parties in a joint action at law upon the bonds, a court of equity will entertain jurisdiction; and the representatives of all the deceased sureties should be made parties to the bill. The 69th (now 25th) section of the statute in giving an action on the bond of the personal representative, against all or any portion of the obligors, has reference only to actions at law, and not to suits in chancery. The last clause of the section, making certified copies of such bonds evidence, was only designed to change a rule of evidence and not the practice in courts of equity.

CHAPTER XXI.

PUBLIC ADMINISTRATORS—THEIR APPOINTMENT AND DUTIES.

§ 247. Appointment—when to administer.

248. May administer on estates of non-residents as well as residents.

249. To give bond—neglect of duty—its effect.

250. Letters to be revoked when it appears that there is any other person entitled thereto.

251. What to be done with any balance of money remaining in his hands.

252. Further duties.

§ 247. The governor of this state is required to appoint, by and with the advice and consent of the senate, a public administrator in and for each county of the state, and to fill vacancies in the office;¹ and the person so appointed is required, before entering upon the duties of his office, to take and subscribe and file in the office of the clerk of the county court, an oath.² (See Form No. 20, and note.)

¹ Stat. Tit. Admin § 44.

² Ib. § 45.

Section 46 provides that, "Whenever any person dies seized or possessed of any *real* estate within this state,³ or having any right or interest therein, (but) has no relative or creditor within this state who will administer upon such deceased person's estate; it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county." In *Langworthy v. Baker*, 23 Ill. 484, the supreme court of Illinois, in considering the jurisdiction of the county court under the foregoing section to commit the administration to the public administrator, said, "We think, before the court could get jurisdiction of this case to act, it should have affirmatively appeared to the court, that there was no relative or creditor within the state to whom administration might be committed. It should further have affirmatively appeared, that the application for the appointment of an administrator on the estate was made by a party interested in the estate. * * * It is the existence of these facts which awakens the power of the court, which calls it into action. They are fundamental facts."⁴ (See Form of Petition, No. 21.)

§ 248. The section last quoted underwent judicial construction in the case of *Bowles' Heirs v. Rouse*, *Public Admr.* 3 Gilm. 409, and in that case it was held, that it applied as well to the estates of non-resident as to resident decedents. It was also held that, the proper county for administration, in case of non-residents dying, leaving lands in this state, is the county where such lands or a part of them are situated.⁵

§ 249. Section 47 provides that, "It shall be the duty of the county judge, upon granting letters of administration to a public administrator, to take bond the same as (from) other

³ See ante, §§ 237, 239, as to the other cases where administration will be granted to public administrators, and the priority of right to administration, between widow, next of kin and creditors.

⁴ See *Wilkins v. Rosenthal*, 1 Leg. News, 139, where letters were denied to the British consul, and administration given to the public administrator.

⁵ In this case the petition alleged that the deceased left no *personal property* of any kind in the state.

administrators; and if any public administrator shall neglect or refuse to take out letters of administration, and give bond as aforesaid, within sixty days after it becomes his duty to do so, his office shall be deemed vacant, and upon the certificate of the county judge of such fact, the governor shall fill such vacancy, as aforesaid." (See Form of Bond, No. 18.)

§ 250. Section 48 provides that, "Whenever administration is granted to any public administrator, and it shall afterwards appear that there is a widow or next of kin, or creditor of the deceased, entitled to the preference of administration by this act, it shall be the duty of the county court to revoke the letters granted to such public administrator, and to grant the same to such widow, next of kin or creditor entitled thereto:" *Provided*, application is made by such person within six months after letters were granted to the public administrator; saving to such administrator, in all cases, all such sums of money on account of commissions or expenses as are due to, or incurred by him, in the management of said estate."

§ 251. Section 49 of the same statute provides, "If any balance of any such intestate estate as may, at any time, be committed to any public administrator, shall remain in the hands of such administrator after all just debts and charges against such estate, which have come to the knowledge of such public administrator within two years after the administration of such estate was committed to him, are fully paid, such administrator shall cause the amount thereof, with the name of the intestate, and the time and place of his decease, to be published in some newspaper published in his county, or if no newspaper is published in his county, then in the nearest newspaper published in this state, for eight weeks successively, notifying all persons having claims or demands against such estate to exhibit the same, together with the evidence in support thereof, before the county court of the proper county, within six months after the date of such notice or that the same will be forever barred;" and if no such claim is presented for

* See ante, § 237.

† For form of notice see Form No. 22.

payment or distribution within the said time of six months, such balance shall be paid into the treasury of said county ; and the county shall be answerable for the same, without interest, to such persons as shall thereafter appear to be legally entitled, on order of the county court, to the same, if any such shall ever appear," (For another provision of similar character applicable to other administrators, see post, § 554.)

§ 252. Section 50 provides that, "Upon the death of any person intestate, not leaving a widow or next of kin, or creditor, within this state, the public administrator of the county wherein such person may have died, or when the decedent is a non-resident, the public administrator of the county wherein the goods and chattels, rights and credits of such decedent shall be, may take such measures as he may deem proper to protect and secure the effects of such intestate from waste or embezzlement, until administration thereon is granted to the person entitled thereto ; the expenses whereof shall be paid to such public administrator, upon the allowance of the county court, in preference to all demands against such estate, funeral expenses excepted."^a

CHAPTER XXII.

OF REVOCATION OF LETTERS AND REQUIRING NEW BONDS.

§ 253. Letters to be revoked when granted upon false or fraudulent pretense. Administrator to pay the costs.

254. Letters to be revoked if will afterwards found. But acts done in the meantime are valid. Limitation of two years applies to all such.

255. Letters to be revoked where will or codicil is set aside, or the personal representative becomes insane, an habitual drunkard, convicted of infamous crime, or wastes or mismanages the estate so as to endanger securities, etc. Reason to be stated on the record.

^aSee ante, § 230.

§ 256. Other misconduct specified which is a cause of revocation.

257. If personal representative removes property from the state, his letters may be revoked.

258. Practice in case of revocation.

259. Increased security may be required, and failure to give it a cause of revocation.

260. When sureties conceive themselves in danger of suffering—the duty of the court—when letters may be revoked.

261. New bonds, their form.

262. Where two new bonds were taken—effect.

263. When surety desires to be released—proceedings—when letters revoked.

264. When a sole personal representative dies without having fully administered the estate, letters with will annexed may be granted.

265. Where the letters of one of several personal representatives are revoked or he dies or becomes disqualified—vacancy may be filled and bond required of the new administrator, etc.

266. Where letters are revoked—liability on bond.

267. Administrator *de bonis non* may call on removed administrator to account. Cases stated.

268. Resignation of the personal representative. Proceedings.

269. Acceptance of resignation amounts to a revocation of letters.

270. Liability of personal representatives for the acts of each other.

§ 253. It is the duty of the court to revoke letters of administration in all cases where they were granted to any person upon the false and fraudulent pretense of being a creditor of the estate upon which administration is granted, or upon any other false pretense whatever;¹ and upon revoking such letters to adjudge the costs of suit against the administrator.² (For form of petition, see Form No. 23. Form of clerk's entry, see Form No. 31.)

§ 254. If at any time after letters of administration have been granted, a will of the deceased shall be produced and probate thereof granted, such letters of administration shall be revoked.³ But it is the received doctrine, that all acts done,

¹ Stat. Tit. Admin. § 26. An illegitimate son of the intestate does not stand in a position to apply for revocation, he not having a right to administer upon the estate. *Myatt v. Myatt*, 44 Ill. 473.

² *Ib.* § 27.

³ *Ib.* § 28. See *Shepard v. Rhodes*, in Sup. Court of Illinois, 1872, 4 Leg. News, 453, where letters of administration were held to be valid till revoked.

either by administrators before notice of a will, or by executors or administrators, who may be removed or superseded, or become incapable, shall remain valid, and not be impeached on any will appearing, or by any subsequent revocation.⁴ And the limitation of two years in the 70th section runs against creditors in such cases from the date of the letters.⁵

§ 255. In all cases where a will or codicil has been proved and letters granted thereon, and the same shall be set aside, such letters shall be revoked.⁶ And the court may revoke letters testamentary, or of administration, granted to persons who become insane, lunatic or of unsound mind, habitual drunkards, are convicted of infamous crimes, waste or mismanage the estate, or who conduct themselves in such manner as to endanger their co-executors, co-administrators or securities; in which cases the court shall summon the person charged to be so in default or disqualified, to show cause why his letters should not be revoked. When revocation is made, the reason therefor shall be stated at large on the record.⁷

§ 256. The refusal of an administrator to perform the duties of his trust, is a sufficient cause for revoking his authority.⁸ So is an unauthorized preference by him in the payment of demands against the estate.⁹

§ 257. An executor or administrator is prohibited from removing, without the order of the court, any property where-with he is charged, by virtue of his letters, beyond the limits of this state. And in case he does remove such property without such order, the court must, on notice, forthwith revoke his letters and appoint a successor, and cause a suit to be instituted on his bond, against him and his security, for the use of the person interested in the estate; and if it appears, upon the trial of

⁴ 2 Kent Com. 413. *Wight v. Wallbaum*, 39 Ill. 554.

⁵ *Shepard v. Rhodes*, supra.

⁶ Stat. Tit. Admin. § 29.

⁷ Ibid. § 30. As to what are infamous crimes see ante, § 220. See Form No. 24. For Clerk's Entry, see Form No. 32.

⁸ *Marsh v. People*, 15 Ill. 284.

⁹ *Foltz v. Prouse*, 17 Ill. 487.

such cause, that the executor or administrator has so removed such property, judgment must be rendered against the offender and his securities for the full value thereof, and for such other damages as the parties interested may have sustained by reason thereof.¹⁰

§ 258. In all cases where the revocation of letters to an administrator or an executor is sought, the better practice would be for the court to require a petition under oath, or an affidavit, alleging the causes, for revocation, to be filed with the clerk, and to cause a citation or summons to be issued to the administrator or executor, to show cause why the letters issued to him should not be revoked; and upon his appearing or failing to appear, to hear proof in support of the allegations in the petition; and if the court should order the letters revoked, the reason therefor should be stated at large upon the record. (See Forms No. 31, 32.)

§ 258a. When it comes to the knowledge of the county court, by affidavit or otherwise, that any executor or administrator of an estate is about to remove or has removed beyond the limits of this state, it is the duty of such court to cause a notice to be published in some newspaper in the county where his letters were granted, for four successive weeks; and if no newspaper is published in such county, then by posting up a notice at the court house door, notifying such executor or administrator to appear before the court within thirty days after the date of such notice, and make a settlement of his accounts as required by law. If he neglects or refuses to make such settlement, it is the duty of the court to remove him from office.¹¹

§ 259. When insufficient security has been taken upon the bond from an executor or administrator, at the time letters were granted to him; or when any security heretofore taken becomes insufficient, the court may, upon the application of any person entitled to distribution, or otherwise interested in such estate,¹² require such executor or administrator to give other and suf-

¹⁰ Stat. Tit. Admin. § 86.

¹¹ Stat. Tit. Admin. § 31. Form of Affidavit and Notice Nos. 25, 25½.

¹² Form No. 26. And see Form of Clerk's Entry No. 33.

ficient security; and in default thereof the letters issued to such executor or administrator, shall be revoked, and administration *de bonis non* granted; but all acts done according to law by the executor or administrator so removed prior to such revocation, shall be valid.¹³

§ 260. When a surety for an executor or administrator or his representatives may conceive himself or themselves in danger of suffering by the mismanagement of such executor or administrator, and shall petition the county court for relief, in writing, setting forth the cause of such apprehension, the said court shall examine such petition, and if the court shall deem the causes therein set forth sufficient to entitle the petitioner or petitioners to relief, if true, he shall summon such executor or administrator to show cause against such petition, and may dismiss the same, or direct such executor or administrator either to give good counter security to save such petitioner or petitioners harmless, or to give a new bond in the like penalty as the first; and upon refusal or neglect to give such counter security, or new bond, the letters granted to him may be revoked.¹⁴ (Form of Petition No. 27.)

§ 261. When a new bond is required to be given by an executor or administrator under either of the preceding sections, the formal part of the bond shall be as heretofore prescribed, with a condition thereto, substantially in the following form, to wit. (See Form No. 28.) Which bond shall be signed, sealed, approved, *attested* and filed in the same manner as other executor's or administrator's bonds are, and shall have relation back to the time of granting letters testamentary or of administration.¹⁵

§ 262. Sections thirty-three and thirty-four of the statute are the same in substance as sections seventy-nine and eighty of the law of 1845, under which, in *The People v. Lott*, 27 Ill. 215, the court held, that taking two new bonds from the administrator, the penalty of which being added together, equalled in

¹³ Stat. Tit. Admin. § 32: See *Wight v. Wallbaum*, 39 Ill. 554. See *People v. Curry*, 59 Ill. 35.

¹⁴ Stat. Tit. Admin. § 33.

¹⁵ *Ib.* § 34. See *Pinkstaff v. People*, 59 Ill. 148.

amount the penalty in the old bond, was a substantial compliance with the statute, which requires that the new bond shall be in the like penalty as the first; and that a new bond given by an executor or administrator under these sections, releases the sureties upon the first bond from all liability from past as well as subsequent acts; but, if, instead of a new bond being given, the letters should be revoked, the sureties would only be released from future liabilities.

§ 263. When a surety on the bond of an executor or administrator desires to be released from further liability upon such bond, he may petition the court in which the same is filed, for that purpose,¹⁶ and upon notice being given to the executor or administrator, as the court may direct, the court shall compel such executor or administrator, within a reasonable time, to be fixed by the court, to settle and adjust his accounts, and pay over whatever balance may be found in his hands, and file in such court a new bond, in such penalty and with such security as may be approved by the court, and thereupon the surety so petitioning may be discharged from all liability upon his bond.¹⁷ But if such executor or administrator shall fail to comply with such order within the time fixed by the court, the court shall order him removed from his office, and shall appoint some other fit person as administrator, with will annexed, or *de bonis non*, who shall give a bond as required by law. And in case the former executor or administrator shall fail to settle his accounts and to pay over to the person so appointed all moneys, effects or choses in action in his hands by reason of his said office, then such successor shall collect the same by suit against him, or by suit upon his bond; and upon collection thereof his surety shall be discharged.¹⁸ And where the personal representative fails to make a settlement of the estate when ordered by the court so to do, he may be dealt with as for contempt, and be removed.¹⁹

¹⁶ See Form No. 29.

¹⁷ Stat. Tit. Admin. § 35.

¹⁸ Stat. Tit. Admin. § 36.

¹⁹ Ib. § 114. See post, § 544.

§ 264. When a sole or surviving executor or administrator dies without having fully administered the estate, if there is personal property not administered, or there are debts due from the estate, or there is any thing remaining to be performed in the execution of the will, the court shall grant letters of administration, with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the estate of the deceased not already administered; but when there is still a surviving executor or administrator, he may administer the estate, unless otherwise provided.²⁰

§ 265. When the letters of one of the several executors or administrators are revoked, or one or more of the executors shall die or become disqualified, the court may fill the vacancy, caused thereby, and require additional bonds from the new administrator or administrators; or the survivor or survivors, or such as shall not have their powers revoked, shall manage the estate. When the letters of all of them are revoked, or all of such executors or administrators die before final settlement and distribution of the estate, administration, with the will annexed, or *de bonis non*, shall be granted to the persons next entitled thereto.²¹

§ 266. In all cases where an executor or administrator shall have his letters revoked, he shall be liable on his bond to the administrator appointed in his place, or to any other person aggrieved, for any mismanagement of the estate committed to his care; and the subsequent administrator may have and maintain actions against such former executor or administrator for all such goods, chattels, and credits as shall have come to his possession, and which are withheld or have been wasted, embezzled or misapplied, and no satisfaction made for the same.²²

§ 267. An administrator *de bonis non*, appointed to succeed an administrator whose letters have been revoked,²³ or any

²⁰ Stat. Tit. Admin. § 37.

²¹ Stat. Tit. Admin. § 38. The persons next entitled are specified, ante, §§ 237, 239.

²² Stat. Tit. Admin. § 39.

²³ The acceptance by the probate court of the resignation of an administrator, amounts to a revocation of his letters. *Marsh v. People*, 15 Ill. 284.

other person aggrieved, has authority to call upon the removed administrator to account fully for his administration of the estate; and may maintain all necessary actions for the purpose, and may moreover make him answer in damages, for any maladministration of the estate.²⁴ But the representative of a deceased administrator cannot be called upon by an administrator *de bonis non* to account for assets already administered by such deceased administrator; but this may be done by heirs and distributees.²⁵ In such case the power of the administrator *de bonis non* extends only to the recovery of such goods and chattels of the intestate as remain unadministered in specie, and to debts due the intestate which remain unpaid. His authority does not extend to assets already administered.²⁶

§ 268. The statute, title Administration, § 40, provides that, an executor or administrator may, upon his petition and upon giving such notice to the legatees, devisees or distributees as the court shall direct, be allowed to resign his trust when it appears to the court to be proper; and upon such resignation the court shall grant letters of administration with the will annexed, or *de bonis non*, to some suitable person, to administer the goods and estate not already administered. But he cannot be discharged till he has made full settlement with the court and complied with its orders, and delivered over to his successor all money, chattels and effects of the estate in his hands, not paid over according to the orders of the court. And section 41 provides that, he shall pay all costs of the proceeding, and that the court shall render a judgment against him for such costs, and that they may be collected by execution, as in other cases.²⁷

§ 269. The acceptance by the court of the resignation of an

²⁴ Ibid. *Duffin v. Abbott*, 48 Ill. 17—the latter case overruling *Stose v. Stose*, 25 Ill. 600 and *Short v. Johnson*, Ib. 489. In the first case there was a revocation of the letters, and in the other a resignation which was accepted by the court.

²⁵ *Rowan v. Kirkpatrick*, 14 Ill. 1; *Newhall v. Turney*, 14 Ill. 338; *Marsh v. People*, supra; *Duffin v. Abbott*, supra.

²⁶ Ibid.

²⁷ Form of Notice and Petition to Resign, 30.

administrator, amounts to a revocation of his letters; and if there are other administrators the burden of administration falls upon them.²⁸

§ 270. One of the several administrators is liable for the acts done by either while they all continue in office; but this liability ceases to attach to such of them as are removed from office, for all acts done after the removal.²⁹

CHAPTER XXIII.

OF THE INVENTORY.

§ 271. Duties of executors and administrators are similar after the grant of letters.

272. Duty to make and file an inventory,— what it shall contain.

273. Additional inventory, when required.

274. When growing crops may be inventoried and sold.

275. Extent of liability of the personal representative.

276. Inventories and bills of appraisement and authenticated copies as evidence.

277. Inventory of effects prima facie evidence of personal representative's liability.

278. Classification of credits into "good, doubtful or desperate,"— presumption if not so classed.

278a. When appointment of a debtor as executor amounts to a release of the debt.

279. Interest of a deceased partner in partnership effects— how inventoried.

280. Property deposited in the hands of a third party, and demands assigned to secure payment of debts, and property fraudulently conveyed by deceased, as against creditors, must be inventoried.

281. The distinction between personal and real property, and the duty of the administrator in case of fraudulent sale considered.

282. Money due the deceased on a contract for the sale of land, considered personal estate.

283. Real estate to be inventoried.

²⁸ *Marsh v. The People*, 15 Ill. 284; Stat. § 37.

²⁹ *Ibid.*

- § 284. Freeholds to be inventoried as real estate, estates for years as personal estate.
285. The interest of a mortgagee is personal estate, so is the interest of mortgagor in a surplus remaining after the sale under a power of sale in the mortgagee's hands.
286. Growing fruit until severed is part of the realty, so all fruit trees and other shrubbery, unless sold and conveyed.
287. Emblements regarded as personalty.
288. The right to enter, cultivate and take them away.
289. Effect of a conveyance of land on growing crops.
290. The case of *Powell v. Rich*, and other cases cited.
292. Rent, whether it goes to the heir or the administrator.
293. Where land is let upon shares for a single crop or otherwise—cases stated.
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305. The case of *Mason v. Fenn*.
306. Distinction between landlords and mortgagees.
307. Rails in fences and those accidentally detached. Their severance by valid contract.
308. Fixtures erected by persons under a contract for conveyance, held to be realty.
309. Annuities, how regarded.
- 310, 311. Shares in corporations and the interest in literary property are personalty.
312. Damages allowed for lands taken for public purposes, when they belong to the heir and when to the personal representative.

§ 271. From the time that letters testamentary or of administration have been accepted, the duties of executors and of administrators are so nearly alike that they will hereafter be treated of together, though distinctions between those duties will be pointed out from time to time, when necessary to a clear understanding of the same.

§ 272. The first step to be taken by both executors and administrators is to prepare and file an inventory of the real

and personal estate of the deceased, and the statute, title Administration, § 51, has specified what the inventory shall contain. It directs that, "Whenever letters testamentary or of administration, or of collection, are granted, the executor or administrator shall make out a full and perfect inventory of all such real and personal estate, or the proceeds thereof, as are committed to his superintendence and management, and as shall come to his hands, possession or knowledge, describing the quantity, situation and title of the real estate, and particularly specifying the nature and amount of all annuities, rents, goods, chattels, rights and credits, and moneys on hand, and whether the credits are good, doubtful or desperate; which said inventory shall be returned to the office of the clerk of the county court, within three months from the date of letters testamentary or of administration." (See Form No. 34.)

§ 273. And section 52 provides that, "If after making the first inventory, any other real or personal estate of the deceased comes to his possession or knowledge, he shall file a similar additional inventory thereof."

§ 274. And section 94 provides that, if the executor or administrator is of opinion that it would be of advantage to the estate to dispose of the crop growing, and not devised,¹ the same shall be inventoried, appraised and sold like other personal property; but if the executor or administrator believes it would be of more advantage to the estate, he may cultivate such crop to maturity, and the proceeds of such crop, after deducting all necessary expenses for cultivating, gathering and making sale of the same, shall be assets in his hands, and subject to the payment of debts and legacies, and to distribution as in other cases.

§ 275. By section 58, executors and administrators are chargeable with so much of the real and personal estate of the decedent, as they, after due and proper diligence, do or might receive.*

§ 276. Section 56 provides that, "Inventories and bills of

¹ Where land is devised, growing crops go to the devisee. *Creel v. Kirkham*, 47 Ill. 344.

* See *Governor v. Woodworth*, 63 Ill. 254.

appraisement and authenticated copies thereof may be given in evidence in any suit by or against the executor or administrator, but shall not be conclusive for or against him, if any other testimony be given that the estate was really worth, or was *bona fide* sold for more or less than the appraised value thereof."

§ 277. The inventory of effects of the deceased is *prima facie* evidence of what came to the hands of the executor or administrator, and will impose upon him the burden of showing how he has disposed of the same.²

§ 278. We have seen that the statute requires the executor or administrator to state in the inventory of credits, whether each of them is good, doubtful or desperate.³ And it has been held that debts inventoried without comment will be presumed collectible, and the party charged with the amount, unless upon proof of loss without fault.⁴ But it has been intimated that further proof may be required to charge the executor or administrator with the collections of debts due the estate.⁵ And if they are inventoried as desperate or doubtful, the administrator will not be charged with the amount, except upon proof that he did or might have collected them.⁶

§ 278 *a*. As to when the appointment of a debtor as executor of a will amounts to a release of the debt and when not, see ante, § 110 *a*.

§ 279. The interest of a deceased partner in the partnership can only be inventoried as an unascertained balance.⁷ The surviving partner, as we shall presently see,⁸ is required to make an inventory of all the estate of the partnership, and a list of the liabilities thereof, and also cause the estate to be appraised in like manner as the individual property of deceased

² *Giles v. Dyson*, 1 Stark. N. P. 32.

³ Ante, § 272.

⁴ *Graham v. Davidson*, 2 Dev. & Batt. Ch. 155; *Shelley's Case*, 1 Salk. 296; *Smith v. Davis*, Bull. N. P. 140.

⁵ *Giles v. Dyson*, *supra*.

⁶ *Rowan v. Kirkpatrick*, 14 Ill. 1; *Finch v. Ragland*, 2 Dev. Ch. 137.

⁷ *Thompson v. Thompson*, 1 Bradf. Sur. Rep. 24.

⁸ §§ 343, 345.

persons. He is also required to return such inventory and appraisement, within sixty days after the death of the partner, to the county court of the county in which the deceased resided, or carried on the partnership business at the time of his death. And in case the deceased was a non-resident, the inventory must be made to the county court granting letters of administration.

§ 280. The personal representative should inventory property deposited in the hands of a third party merely for custody,⁹ and also demands assigned to secure the payment of debts.¹⁰ And he should inventory property fraudulently conveyed by the deceased, as against creditors. He so far represents the interests of the creditors, that he may take possession of estate so circumstanced, and retain the possession of the same, as against the fraudulent grantee, until it can be shown if it will be required for the payment of debts.¹¹

§ 281. But this must be considered as applying to personal property only. For the personal representative cannot, for the benefit of the creditors of the estate, impeach a voluntary conveyance made by the deceased to defraud his creditors.¹² Where the deceased had purchased land with his own funds and had it conveyed in the name of his child, with the fraudulent design of preventing his creditors from collecting their debts, and a creditor proved and had his claim allowed in the probate court, it was held, that he might in the absence of personal estate sufficient to pay the judgment, proceed by bill in equity against the child and the personal representative of the deceased, to subject the land in question to the payment of his judgment.¹³

§ 282. Money due a testator at his decease, upon a contract

⁹ *Potter v. Titecomb*, 1 Fairf. 53.

¹⁰ *Williams v. Moorehouse*, 9 Conn. 470.

¹¹ *Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 8 Conn. 106; *Andrus v. Doolittle*, 11 Conn. 283. But see *Martin v. Martin*, 1 Vt. 91; *Peaslee v. Barney*, 1 Chip. 331; *Moody v. Fry*, 3 Humph. 567.

¹² *Choteau v. Jones*, 11 Ill. 300, and cases cited.

¹³ *McDowell v. Cochran*, 11 Ill. 31. But the personal representative is a necessary party. *Ib.*

for the sale of real estate, made by him, no deed having been executed, is to be considered a part of his personal estate, the same as other debts due the estate.¹⁴

§ 283. Whilst real estate goes in general to the heir and is in nowise subject to the control of an administrator, or of an executor, unless such control is given by the will, nevertheless, when the personal estate is insufficient to pay the debts, the land may be subjected to sale for their payment.¹⁵ For this reason, and perhaps for the general convenience of all parties interested, as heirs, devisees, legatees and creditors, the statute requires the inventory to set forth the quantity, situation and title of the land.

§ 284. But there are certain interests arising out of land which are not considered as real estate, but are treated in matters of administration as personal property, and go to the executor or administrator. They are denominated chattels real, and include all estates for years, however long the period of duration. These should be inventoried and sold like other personal property. But all estates for life or for an uncertain period which may endure for life, as, during widowhood, or so long as one shall remain unmarried, or during coverture, or as long as the grantee shall dwell in a particular place, are regarded as estates of freehold, and go to the heir.¹⁶ These, of course, must be inventoried and treated as real estate.¹⁷

§ 285. The interest of a mortgagee is treated as mere personalty, and goes to the administrator.¹⁸ It is a mere debt coming to the estate, and should be inventoried as such, accompanied with a proper description of the land, etc. Where a mortgage contains a power of sale, and by means of the sale of

¹⁴ *Skinner v. Newberry*, 51 Ill. 203, and cases cited.

¹⁵ An administrator takes no estate, right, title or interest in realty. He takes only a power. *Smith v. McConnell*, 17 Ill. 135. See, especially, post, §§ 434, 435.

¹⁶ 1 Wms. Ex'rs, 592; Co. Litt. 42 a.

¹⁷ But either of these may be subject to homestead rights. See statute, Tit. Homestead Exemption, § 1; also Tit. Dower.

¹⁸ 1 Wms. Ex'rs, 608. *Scott v. Moore*, 3 Scam. 306.

the whole estate a surplus of money is produced above what is required to satisfy the mortgage — if this is done during the life of the mortgagor it will thereby become personal estate to all intents, and go to the administrator. But if the sale takes place after the death of the mortgagor, it will still be regarded as real estate, since an equity of redemption is always so regarded, and as such, primarily goes to the heir.¹⁹

§ 286. Growing fruit upon land, until it is severed, is regarded as part of the realty,²⁰ and goes to the heir.²¹ So are fruit and other growing trees and ornamental shrubbery. But all of these may be sold by the proprietor, and conveyed by proper conveyance in writing, when, in contemplation of law, they become severed from the land and become personalty, and go to the executor or administrator.²²

§ 287. That species of estate in growing crops which are denominated emblements, where the estate determines without the fault of the tenant, as by the act of God, or of the law, and not by the voluntary and willful act of the tenant, is regarded as mere personalty, and goes to the executor or administrator of the tenant. The term emblements includes only such crops as are the result of special labor and cultivation, and which commonly repay such labor within the year, such as grain of all kinds, as well as the products of the garden, and other root crops. It also includes hops, which though not planted annually, require cultivation each year. But this does not include fruit trees; though in the case of nurserymen, who plant and cultivate trees for sale, their executors may remove them from the land as personalty.²³

¹⁹ *Wright v. Rose*, 2 Sim. & Stu. 323; *Bourne v. Bourne*, 2 Hare, 35; *Bogert v. Furman*, 10 Paige, 496; *Moses v. Murgatroyd*, 1 John. Ch. 119; *Cox v. McBurney*, 2 Sandf. Sup. Ct. 561.

²⁰ *Rodwell v. Phillips*, 9 M. & W. 501.

²¹ 3 Redf. Wills. § 21, pl. 4 (1 a), and cases cited.

²² *Stukely v. Butler*, Hob. 168; *Herlakenden's Case*, 4 Coke, 62 a; *Adams v. Smith*, Breece, 283; *Smith v. Price*, 39 Ill. 28; *Greenwood v. Spiller*, 2 Scam. 503. See also post, § 290.

²³ *Perton v. Robart*, 2 East, 88; 5 B. & Adol. 52; 3 Redf. Wills. § 21, pl. 4 (1 a.); 1 Wash. R. P. ch. 5; *Debow v. Colfax*, 5 Halst. 128; *Gee v.*

§ 288. When there is a right to emblements the law gives the owner the right to enter upon and occupy the land for the purpose of cultivating, saving and carrying them away.²⁴ This, however, is not a right of exclusive possession, but only for the purposes above mentioned.²⁵

§ 289. A conveyance of land will pass all the vendor's interest in the growing crops, unless they are reserved in writing.²⁶ So also where land is devised, they will go to the devisee,²⁷ unless the will expressly or by fair implication otherwise disposes of them.²⁸ They may also be bequeathed to one, and the land devised to another.²⁹

§ 290. In *Powell v. Rich*, 41 Ill. 466, which was a controversy as to whether growing corn could be excepted from the conveyance, by a parol reservation made at the same time, the court held that it could not. And *Walker*, C. J., in delivering the opinion of the court (p. 469), says, "As between landlord and tenant, between debtor and creditor, and under our statute as between executor and heir, growing crops are personal property. But between trespasser and owner of the soil, and vendor and vendee, they are real estate. * * * After crops have been matured, however, it is otherwise. * * * And to pass by a sale by the owner of the soil, it must be evidenced by a written agreement." If the last proposition is intended to declare that the owner of the soil cannot make a valid sale of growing crops by parol, as the reporter in making his syllabus evidently understood it, we may properly call attention to the case of *Bull v. Griswold*, 19 Ill. 631, where it was held that growing crops are personalty, and may be sold by parol. So in *Austin v. Sawyer*, 9 Cowen, 39, where this question was di-

Gee, 2 Dev. & Batt. Ch. 103; *Bevans v. Briscoe*, 4 Har. & Johns. 139, and see *Smith v. Price*, 39 Ill. 28.

²⁴ *Forsythe v. Price*, 8 Watts, 282.

²⁵ *Humphreys v. Humphreys*, 3 Ired. 362.

²⁶ *Powell v. Rich*, 41 Ill. 466. See *Smith v. Price*, 39 Ill. 28, and *Bull v. Griswold*, 19 Ill. 631.

²⁷ *Creel v. Kirkham*, 47 Ill. 344; *Spencer's Case*, 5 Winch. 51.

²⁸ See *West v. Moore*, 8 East, 339, and *Dixon v. Niccolls*, 39 Ill. 372.

²⁹ *Cox v. Godslave*, 6 East, 604.

rectly before the court, it was held that the owner of the soil could sell growing crops by parol, and the statute of frauds did not apply to such a case. And in *Whipple v. Foot*, 2 Johns. 422, and *Stewart v. Doughty*, 9 Johns. 107, it was held that crops growing upon leased land might be sold by the tenant by parol contract. In *Reed v. Johnson*, 14 Ill. 258, which arose before justices of the peace had jurisdiction of trespass upon realty, it was held, that growing crops were personal estate, and that a justice had jurisdiction in an action for taking and injuring growing corn. So in *Graff v. Fitch*, 58 Ill. 373, it was held that growing crops are a proper subject of sale as personal property by parol, and such sales are valid as against the creditors of the vendor.³⁰

§ 292. Rent accruing out of land, upon a lease granted by the owner in fee, and which does not become due till after the death of the lessor, is a chattel real, and descends to the heir, as part of the inheritance, and does not go to the executor or administrator. It is otherwise if the owner dies after the rent is due.³¹ If the lessor, makes an unqualified grant of leased land, the rent passes to the grantee as an incident of the reversion. But he may sever the rent from the reversion by reserving it in writing.³²

§ 293. If land is let upon shares, for a single crop only, it does not amount to a lease, and the possession remains in the owner.³³ The occupant however is a tenant in common with the owner, of the growing crop, and he continues so until the tenancy is severed by a division.³⁴ But if the contract, is that the lessee shall possess the land with the usual privileges of enjoyment, it is the creation of a tenancy for a year, though the

³⁰ See ante, § 286.

³¹ *Green v. Massie*, 13 Ill. 363; *Foltz v. Prouse*, 17 Ill. 487; *Sherman v. Dutch*, 16 Ill. 285; *Dixon v. Niccolls*, 39 Ill. 372. On the death of the lessor the rent not then due must be apportioned among the heirs by the lessee. Treat, C. J., in *Crosby v. Loop*, 13 Ill. 625.

³² *Crosby v. Loop*, supra.

³³ *Bradish v. Schenck*, 8 Johns. 151.

³⁴ *Walker v. Fitts*, 24 Pick. 191; *Alwood v. Ruckman*, 21 Ill. 200.

land is taken to be cultivated on shares ;³⁵ and the parties are not tenants in common of the crop raised ; but the tenant remains the exclusive owner of such crop until the stipulated rent is set off to the landlord.³⁶ Whether the relation of landlord and tenant exists between the owner of the soil and him who plants the crop raised, depends upon the intention of the parties. The right of exclusive possession by the tenant is, it seems, generally conclusive in favor of the former relation.³⁷

§ 294. Where the rent is payable on a particular day, it is not due until the last minute of that day ; and if the lessor dies before sunset, the heir, and not the executor, is entitled to it.³⁸ In the case of *Dixon v. Niccolls*,³⁹ the tenant rented the land for the year beginning March 1, 1864, and ending March 1, 1865, the rent to be one-third of the crops, payable in kind ; the small grain rent (wheat, oats and barley), to be delivered to the landlord in the half bushel at the threshing machine as soon as threshed ; but there was no time fixed for the threshing to be done, and the tenant had exclusive possession. On the first day of October, 1864, and before the small grain was threshed, the landlord conveyed the premises, without reservation of crops or rent. *Held*, that the relation of landlord and tenant existed ; that the tenant remains the exclusive owner of the crop until the stipulated rent is set off to the landlord ; that the parties were not tenants in common of the crop raised ; that the rent was not due till March first, 1865, and that the vendee of the premises was entitled to the same.

§ 295. The personal representative should be careful in preparing his inventory of rents, to specify the rent not due at the date of the decease, along with the realty, where it belongs ; but if it was then due, it should be inventoried among the de-

³⁵ *Jackson v. Brownell*, 1 Johns. 267 ; *Alwood v. Ruckman*, supra, *Dixon v. Niccolls*, 39 Ill. 372 ; 4 Kent, 95.

³⁶ *Dixon v. Niccolls* ; *Alwood v. Ruckman*, supra. *Stewart v. Doughty* 9 Johns. 107.

³⁷ *Dixon v. Niccolls* ; *Jackson v. Brownell*, supra.

³⁸ 3 Bac. Abr. 33 ; 1 Saund. 287 ; 1 P. Wms. 177 ; *Harg. Co. Litt.* 202, n. 1.

³⁹ 39 Ill. 372.

mands due the estate. And if the deceased was to share in the crops, and was a tenant in common thereof, along with him who planted them, they may be properly specified, for example, as an undivided third of twenty acres of wheat, raised by A. on etc., and now growing, or in stack, according to the facts.

§ 296. At common law actions of contract, upon the death of either party, survive to or against the personal representative of each.⁴⁰ But an action for a breach of marriage contract is not within the rule.⁴¹

§ 297. The covenants in a conveyance of land, that the grantor is lawfully seized, that he has good right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land or passing to the assignee; for if not true, there is a breach of them as soon as the deed is delivered, and the right of action is perfect. Upon these, therefore, the personal representative of the grantee may sustain an action.⁴² But those covenants which run with the land, as, that the grantee shall quietly enjoy; that the grantor will warrant and defend against all lawful claims, and the like, are prospective, and until an actual ouster or eviction, there is no breach of them. Hence, the personal representative, having no title to or interest in the land, has no right of action upon these covenants, not even for a breach in the lifetime of the grantee, unless he can show some special damages to the personal estate of the deceased.⁴³ But for such breaches of real covenants as occurred in the lifetime of the ancestor, but occasioned him no actual damage, or after his death, the action should be brought by the heir or devisee, who, in this respect, is invested with the same rights as would have devolved upon the heir.⁴⁴

§ 298. The personal representative will sometimes find it

⁴⁰ 1 Ch. Pl. 68; 3 Bla. Com. 302.

⁴¹ *Lattimore v. Simmons*, 13 Serg. & R. 183; *Stebbins v. Palmer*, 1 Pick. 71; 1 Ch. Pl. 20, 51.

⁴² 4 Kent, 471; 1 Ch. Pl. 19; *Burnham v. Susselle*, 35 Ind. 425.

⁴³ 4 Kent, 471; 1 Ch. Pl. 19.

⁴⁴ 1 Ch. Pl. 21.

difficult to determine whether certain other kinds of property belong to the realty and go with it to the heir or devisee, or are personal estate and are to be inventoried as such, and sold. These questions will arise not only with respect to the inventory, but whether he or the heir shall bring suit for injuries done to such property. And this brings us to the law of "Fixtures."

§ 299. It may be stated as a general proposition of law, that every thing fixed to land, either immediately, as a house, or mediately, as a window in a house, belongs to the proprietor of the land. And this rule prevails where one man builds a house on the land of another, or fixes the chattels belonging to another in his house. But a man may have occasion to fix to the land of another a chattel belonging to himself, and yet not be willing to part with his property in the chattel. Thus, where a house is let by the owner to another for a term, it may be necessary for the tenant, in order to the comfortable or convenient occupation of such house, to fix therein articles of his own. In this case the general rule is modified; and a party who under such circumstances, makes annexations to the land of another, is allowed to remove the things so annexed, at any time during the tenancy. Things thus annexed to the land, and removable, are denominated fixtures. And although during the period of their annexation, they are considered as a portion of the land, the party fixing them is allowed to reduce them again to a chattel state.

§ 300. Fixtures of the kind just mentioned are sometimes divided into two classes: *First*. Those articles which a tenant fixes for the purpose of his trade. *Second*. Those which he fixes for his domestic convenience, or the ornament of his house. In order to ascertain whether, as between landlord and tenant, a particular thing is or is not a fixture, inquiry must be made, 1st. If it is fixed to the land: 2d. If it is useful to the tenant in his trade, or in the occupation of his house, or ornamental to it; and 3d. If it is capable of removal without doing any substantial injury to the house. As these are questions of fact,

each case must depend much upon its own particular circumstances.

§ 301. Fixtures are things fixed to land. If not so fixed they are chattels, and cannot under any circumstances, be considered as a part of the freehold. They must be fixed in or to the ground, or to some substance which has already become a portion of the freehold, in order to deprive them of their character of personal property. Unless this is done, they remain chattels, and may be removed by the party who placed them upon the premises. The mere laying and resting upon the earth, without letting and imbedding into it buildings or erections of any description, will not make them fixtures. This last proposition, though according to the common law of England, may be the law of Illinois, as between landlord and tenant; but as between the heir and the personal representative, or the vendor and purchaser, the case is different. The circumstances and customs of western people are such that this rule would not apply. It would hardly do to say that, an administrator or a vendor could take from the freehold houses, sheds, stables, corn-cribs and the like, because they were erected on foundations merely resting upon the ground.

§ 302. It may be stated generally that, whatever the tenant, for the purpose of trade, erects on or fixes to the premises leased, he may take away at any time before the end of his term. In regard to domestic fixtures, or those articles which a tenant fixes in his house in order to render its occupation more comfortable or convenient, the rule is, that furniture or pictures even when slightly fixed to the walls or floors of a house, are removable by the tenant before the expiration of his term. So, too, furnaces, grates, stoves, cupboards, shelves, bells, carpets nailed to the floor, blinds, curtains, in short, any article which has been fixed to the house, by the tenant for his domestic use, and which is capable of being removed without injury to the house, may be removed by him. A tenant may, however,

⁴⁵ Gibbons' Law of Fixtures; Grady's Law of Fixtures. And see *Fisher v. Dixon*, 12 Cl. & Fin. 312.

lose his right to remove fixtures, by leaving them on the premises, and he may waive it by agreement."⁴⁶ If he does not, during or at the expiration of his term, remove the fixtures erected by him on the demised premises, he will be presumed to have abandoned them; but that presumption may be rebutted by showing an agreement reserving to him the property in them after the term has expired.⁴⁸

§ 303. A building is *prima facie* real estate, and belongs to the owner of the land on which it stands. But it may be personal estate where erected by the builder with his own means, and for his exclusive use, in pursuance of an understanding between him and the owner of the inheritance. And also where erected by a tenant on demised premises. At his death it passes to his personal representatives.⁴⁷ But if erected by one not a tenant, and without any contract, it becomes a part of the land, and cannot be removed by him who erected it.⁴⁸

§ 304. The rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application to fixtures erected by the owner of the land in fee. Therefore, in such cases, all articles fixed to the freehold, whether by screws, solder or other permanent means, or by being let into the soil, partake of the nature of the soil, and will descend to the heir, or pass by conveyance or devise of the land.⁴⁹ Where the owner of the land in fee, for the purpose of better enjoyment of the land, erected upon and affixed to the freehold certain machinery, such as is in use in working coal and iron mines, the purpose for which this was erected, it will go to the heir as part of the real estate.⁵⁰ And when part of a machine is a fixture, and another and essential part of it is movable, and capable of being used in a detached state, the lat-

⁴⁶ 7 Ind. 30; see *Mason v. Fenn*, 13 Ill. 525; Ch. Cort. 362, and notes.

⁴⁷ *Chatterton v. Saul*, 16 Ill. 149; *Goff v. O'Connor*, 16 Ill. 421; *Dooley v. Crist*, 25 Ill. 551.

⁴⁸ *Dooley v. Crist*, *supra*; *Wells v. Bannister*, 4 Mass. 514; *Washburn v. Sproat*, 16 Mass. 449. See *Kelley v. Austin*, 46 Ill. 46.

⁴⁹ *Mather v. Fraser*, 2 Kay & Johns. 536; 3 Redf. Wills, § 22, pl. 12.

⁵⁰ *Fisher v. Dixon*, 12 Cl. & Fin. 312.

ter also will be considered a fixture. But machinery standing merely by its own weight does not become a fixture.⁵¹

§ 305. In *Mason v. Fenn*, 13 Ill. 525, a new boiler, back-stand and mud-valve were placed by the tenant in a steam flouring mill in lieu of old and worthless ones which he removed, and it was held that they were merely trade fixtures, and might be removed by the tenant during the term.⁵²

§ 306. Those things which are denominated trade fixtures between landlord and tenant, and removable by the latter, are considered realty as between mortgagor and mortgagee, and cannot be removed by the former till the mortgage debt is paid.⁵³ And the removal of them by the mortgagee after the mortgagor's death does not vest the property in his personal representative.⁵⁴

§ 307. Rails laid up in fences are a part of the realty, and if accidentally or temporarily detached without any intent of the owner to divert them from their use as part of the fence, they do not lose that character.⁵⁵ So rails belonging to a fence, or hauled on the premises with the intention of erecting a fence, or timber for building, though not erected, but lying loose around the land, and in no wise attached to the freehold, will pass by deed.⁵⁶ But generally articles affixed to the land

⁵¹ *The Met. Co. Society v. Brown*, 26 Beav. 454; *Fisher v. Dixon*, supra; *Burnside v. Twitchell*, 43 N. H. 390.

⁵² The court cites 2 Kent, 343, and Arch. L. and T. 365.

⁵³ *Walmsley v. Milne*, 7 C. B. N. S. 115.

⁵⁴ *Butler v. Page*, 7 Met. 40.

⁵⁵ *Morgan v. Varick*, 8 Wend. 587. See *Clark v. Burnside*, 15 Ill. 62.

⁵⁶ *McLaughlin v. Johnson*, 46 Ill. 163. This case it seems to us, goes too far, or at least, states the rule too broadly. While the authorities would justify the conclusion that rails may be taken from one fence and carried to and distributed along another, on the same premises, for the purpose of repairing it, or distributed along a line for the purpose of building another fence of them on the same premises, and not lose their character of realty while detached; or that rails hauled upon the premises and distributed along the line of an old fence for the purpose of repairing it, or upon a new line for the purpose of erecting them into a new fence, become thereby a part of the realty; yet unless so distributed, the latter could hardly be treated as realty, and pass with the freehold. It seems to us there

become personal property by severance. And such a severance may be actual, or by a valid conveyance of the land reserving them.⁶⁷ Rails in stacks are personal property;⁶⁸ so also before being distributed upon land.⁶⁹ Rails built into a fence by a tenant under an agreement with his landlord that he may remove them at the end of the term, are personal property as between the landlord and tenant.⁷⁰

§ 308. In *Smith v. Moore*, 26 Ill. 392, a purchaser of land went into possession under an agreement for a conveyance, and built a distillery on the premises and annexed thereto copper, lead and brass pipes and other distillery fixtures; these were held to have become a part of the realty, and that he could not remove them without the consent of the owner of the fee. And *Walker, J.*, says, "The exception in favor of trade fixtures is made because the annexations are supposed to be necessary to the calling of the tenant, and not to the land. They are made not with the design of being permanent, but of being severed at the end of the term. Whilst with the purchaser, the presumption is, that they are made with the design of their permanent connection with the land, and as accessory to it. He makes them in view of their being his when he shall have acquired the absolute ownership of the land by conveyance. But until that time, he has only the same right to them which he has to the freehold."⁷¹

§ 309. An annuity, which is the grant of a sum of money

should be some act indicating an intention to fix them to the premises on which they are situated. In the case of *Clark v. Burnside*, 15 Ill. 62, "rails in stacks," were held to be personal property. In *Robertson v. Phillips*, 3 Iowa, 220, rails before being distributed upon land, were held to be personal property. And in *Cook v. Whiting*, 16 Ill. 480, fence posts on the premises, but not attached to the soil, were held not to be fixtures, or to pass by deed.

⁶⁷ —, 1 Barb. 542; — — 1 Denio, 580. *Mott v. Palmer*, 1 Comst. 564. See *Mason v. Fenn*, 13 Ill. 525.

⁶⁸ *Clark v. Burnside*, 15 Ill. 62.

⁶⁹ *Robertson v. Phillips*, 3 Iowa, 220.

⁷⁰ *Mott v. Palmer*, 1 Comst. 564.

⁷¹ This decision reverses that in *Moore v. Smith*, 24 Ill. 512.

to be paid annually, and which may be for life, for a term of years, or in perpetuity, is generally regarded as mere personality, and, as such, will pass to the personal representative of the annuitant, where it extends beyond his own life, unless there is some express provision to the contrary. But if the annuity is granted to the annuitant and his heirs, it will go to such heirs, and not to the personal representative. And an annuity, made a special charge or condition of the devise of real estate, will create a legal rent-charge, and to that extent becomes an interest in realty.⁶²

§ 310. Shares in all corporations, or what is commonly denominated corporate stocks, are mere personality.⁶³

§ 311. The interest in literary property and that in works of art or in patent-rights, will, upon the decease of the original proprietor, vest in the personal representative, and he may obtain the renewal of the copyright, or of the patent.⁶⁴

§ 312. Mr. Redfield⁶⁵ remarks in reference to damages allowed for lands taken for public purposes, "that, upon general principles, after the descent cast upon the heirs by the decease of the ancestor, any land damages thereafter assessed for laying highways or railways, or for other public purposes, must belong to the heir, as being in purchase of a right in the realty." Upon the same principle, such damages assessed but not paid, in the lifetime of the decaased, would go to his personal representative.

⁶² 3 Redf. Wills, § 25 pl. 1, 2.

⁶³ *Ib.* pl. 3.

⁶⁴ 1 Wms. Ex'rs, 730; *Wilson v. Rosseau*, 4 How. U. S. 646.

⁶⁵ 3 Redf. Wills, § 25, pl. 18.

CHAPTER XXIV.

OF APPRAISERS AND THEIR DUTIES.

§ 313. Their appointment — warrant — oath — duties.

314. Appraisement of subsequently discovered property.

315. Further duties.

316. Compensation of appraisers.

§ 313. The statute, § 53, provides that, "On granting letters testamentary or of administration, a warrant shall issue under the seal of the county court, authorizing three persons of discretion, not related to the deceased nor interested in the administration of the estate, to appraise the goods, chattels and personal estate of the deceased, known to them or to be shown by the executor or administrator; which warrant shall be in the following form. (See Form No. 35). And on the death, refusal to act, or neglect of any such appraiser, another may be appointed in his place." And section 54 provides, in substance, that, before proceeding to appraise the estate, the appraisers shall take and subscribe an oath or affirmation, before some officer authorized to administer oaths (see Form No. 36), which shall be annexed to or indorsed on the warrant. And thereupon they shall proceed, as soon as convenient, to the discharge of their duty, and shall set down each article, with the value thereof in dollars and cents. All the valuations must be set down on the right hand side of the paper, in one or more columns, in figures, opposite to the respective articles of property, and the amount of each column set at the foot thereof. By section 55 it is provided that, when the bill of appraisement is completed, the appraisers shall certify the same under their hands and seals, and deliver it to the executor or administrator, and he is required to file it in the office of the clerk of the county court, within three months from the date of his letters. (See Form No. 37.)

§ 314. Personal property coming to the possession or

knowledge of the executor or administrator, and not included in the first bill of appraisement, must be appraised, and return made thereof to the office of the clerk of the county court, as in case of the first appraisement, within three months after discovery of the same.¹

§ 315. In certain cases where the decedent leaves a widow or minor children, the appraisers are required to make out and certify to the county court the value of each of the items of property allowed to her under section 74 of the statute, or to the children under section 77.²

§ 316. Appraisers are entitled to two dollars per day for each day's necessary attendance in making appraisements, to be allowed by the county court, and paid upon its order, by the executor or administrator.³

CHAPTER XXV.

AWARD TO THE WIDOW OR CHILDREN.—WIDOW'S SELECTION.

§ 317. Appraisers to make out and certify the estimated value of items allowed by law to the widow, and to the children in certain cases.

318. Items specified.

319. Estimate, how certified -- comments.

320. Appraisers may award the widow a certain gross sum in lieu of items.

321. The word "family" as used in the statute defined.

322. Widows may take in lieu of the award, the property exempt from execution etc.

323. Items of property exempt.

324. The effect of the repeal of the former statute.

325. Widow may elect whether she will take the specific articles set apart to her or the amount thereof out of other personal property. Administrator's duty in such cases.

¹ Stat. Tit. Admin. § 57.

² Ib. 75; and see sections 74 and 77 at length, post, §§ 318, 320, 327.

³ Stat. Tit. Admin. § 59.

326. Widow's right to her award not to be effected by renouncing or failing to renounce the provisions of the will in her favor.

327. If personal property and assets are not equal to the award, they are to be delivered to the widow, etc. Costs of administration to be first paid.

327*a*. Same subject.

§ 317. By section 75 the appraisers are required to make out and certify to the county court, an estimate of the value of each of the several items of personal property allowed by law to the widow. And by section 77 it is provided that, "When the person dying is at the time of his death a housekeeper, the head of a family, and leaves no widow, there shall be allowed to the children of the deceased, residing with him at the time of his death, including all males under eighteen years of age, and all females, the same amount of property as is allowed to the widow by this act."

§ 318. The statute, title Administration, § 74, provides that, "The widow, residing in this state, of a deceased husband whose estate is administered in this state, whether her husband died testate or intestate, shall, in all cases, in exclusion of debts, claims, charges, legacies and bequests, except funeral expenses, be allowed, as her sole and exclusive property forever, the following, to wit:

First.—The family pictures and wearing apparel, jewels and ornaments of herself and her minor children.

Second.—School books and family library of the value of one hundred dollars.

Third.—One sewing machine.

Fourth.—Necessary beds, bedsteads and bedding for herself and family.

Fifth.—The stoves and pipe used in the family, with the necessary cooking utensils; or, in case they have none, fifty dollars in money.

Sixth.—Household and kitchen furniture to the value of one hundred dollars.

Seventh.—One milch cow and calf for every four members of her family.

Eighth. — Two sheep for each member of her family, and the fleeces taken from the same, and one horse, saddle and bridle.

Ninth. — Provisions for herself and family for one year.

Tenth. — Food for the stock above specified, for six months.

Eleventh. — Fuel for herself and family for three months.

Twelfth. — One hundred dollars' worth of other property suited to her condition in life, to be selected by the widow." This is to be known as the widow's award.

§ 319. This estimate is usually written upon or attached to the appraisement bill. And it should contain the appraiser's estimate of what good, serviceable articles of the kind mentioned are worth, without any regard whatever to the value of those the deceased may have left, except those mentioned in the fifth item. It will be observed that the value of the second, sixth and twelfth items is fixed at one hundred dollars each. If there are no stoves, pipes, etc., mentioned in the fifth item the value is fixed at fifty dollars. (See Form No. 38.)

§ 320. "When there is not property of the estate of the kinds mentioned in the preceding section (74), the appraisers may award the widow a gross sum in lieu thereof, except for family pictures, jewels and ornaments."¹

§ 321, The word "family," as used in the act of 1847, and in precisely the same sense in which it is employed in the present statute, was construed in *Strawn v. Strawn*, 53 Ill. 263, where the court held that, the word "family," as used in that statute, does not include alone the widow and minor children of the deceased, but includes such persons as constituted the family of the deceased at the time of his death, whether servants, or children who had attained the age of majority. It does not include boarders, but only the persons constituting the private household of the deceased. The allowance of bedding, furniture and provisions should be made on this basis.² *Lawrence*,

¹ Stat. Tit. Admin. § 75, last clause.

² In this case the estate of the deceased was worth \$500,000, and the homestead was a large and valuable house. The deceased left eight children, all adults, of whom four made the widow's house their home, though traveling much of the year succeeding the father's death. The family con-

J., said, this statute is not to be construed in regard to the character and amount of such allowance without reference to the circumstances of the parties, but in fixing such allowance the appraisers should take into view the condition and mode of life in which the widow was left by the death of her husband, and regard as necessary that furniture which is ordinary and appropriate for such homesteads.

§ 322. The widow may, if she elect, take and receive in lieu of her award, the same personal property, or money in place thereof, as is or may be exempt from execution or attachment against the head of a family residing with the same.³ (See Form No. 39, and note.)

§ 323. The property exempt from execution or attachment against the head of a family residing with the same, and which the widow may take in lieu of her award, if she elects, is specified in section 13 of the act of 1873, in relation to exemption of homestead and other property,⁴ as follows:

"The following articles of personal property, owned by the debtor, shall be exempt from execution, writ of attachment and distress for rent, viz:

"*First*.—The necessary wearing apparel of every person.

"*Second*.—One sewing machine.

"*Third*.—The furniture, tools and implements of any person, necessary to carry on his trade or business, not exceeding in value one hundred dollars.

"*Fourth*.—Materials and stock designed and procured by him or her and necessary for carrying on his or her trade and business, and intended to be used or wrought therein, not exceeding one hundred dollars in value.

sisted of the widow, the children above referred to, a young woman raised by the family, a housekeeper, a cook, a man servant, and a man acting as superintendent of the farm under the widow's control. The appraisers allowed the widow beds, bedsteads and bedding estimated at \$400; household and kitchen furniture estimated at \$1,600, and provisions for a year estimated at \$1,590. This award was approved successively by the county, the circuit and the supreme courts.

³ Stat. Tit. Admin. § 74, last clause

⁴ Acts of 1873, p. 99.

"*Fifth.*—The implements or library of any professional person, not exceeding one hundred dollars in value.

"And in addition to the above property, when the debtor is the head of a family and resides with the same, the following:

"*First.*—Necessary beds, bedsteads and bedding, two stoves and pipe.

"*Second.*—Necessary household furniture, not exceeding in value one hundred dollars.

"*Third.*—One cow and calf and two swine.

"*Fourth.*—One yoke of oxen, or two horses in lieu thereof, used by the debtor in obtaining the support of his family, not exceeding in value two hundred dollars, and the harness therefor, not exceeding in value forty dollars.

"*Fifth.*—Necessary provisions and fuel for the use of the family for three months, and necessary food for the stock hereinbefore exempted, for the same time.

"*Sixth.*—The bibles, school books and family pictures.

"*Seventh.*—The family library.

"*Eighth.*—Cemetery lots or rights of burial, and tombs or repositories for the dead.

"*Ninth.*—One hundred dollars' worth of other property suited to his or her condition in life, selected by the debtor."

§ 324. The 17th section of the homestead act of 1873, which repeals the act of 1872, title Homesteads, provides that, the repeal shall not affect any rights which have accrued, or any suits or proceedings that may be pending. The act of 1872 exempted a larger amount of property.

§ 325. The widow may elect whether she will take the specific articles set apart to her, or take the amount thereof out of other personal property at the appraised value thereof, or whether she will take the amount thereof in money, or she may take a part in property and a part in money, as she may prefer. (Sec Form No. 39.) And in all such cases it is the duty of the executor or administrator to notify the widow as soon as the appraisement is made, and to set apart to her such articles of property, not exceeding the amount to which she may be entitled, and as she may prefer or select, within thirty

days after written application shall be made for that purpose by the widow. And if the executor or administrator neglects or refuses to comply with such requisition by the widow, he will forfeit for her use the sum of twenty dollars for each month's delay to set apart the property so selected, after the said term of thirty days has elapsed; to be recovered in the name of the people of the state of Illinois, for the use of such widow, in any court having jurisdiction of the same.⁵

§ 326. The right of a widow to her award is in no case to be affected by her renouncing or failing to renounce the benefit of the provisions made for her in the will, or otherwise.⁶ As to the effect of this section upon the 10th section of the statute, title Dower, see note to Form No. 1, Wills, ante, § 210.

§ 327. If the executor or administrator of an estate discovers, at any time after an inventory and appraisement of the property is made, that the personal property and assets of the estate do not exceed the amount of the widow's award after deducting the necessary expenses incurred, such executor or administrator shall report the facts to the court, and, if the court finds the report to be true, he shall order said property and assets to be delivered to the widow by the executor or administrator, and discharge him from further duty; but such executor or administrator shall first pay out of the property and assets the costs and expenses of administration.⁷ (See Forms of Petition and Order, Nos. 30, 41.)

§ 327a. After the court orders the delivery of such property and assets to the widow, the clerk of said court shall make and deliver to her a certified copy of the order, under seal, which shall vest her with complete title to said property and assets, and enable her to sue for and recover the same in her own name and for her own use. Such widow shall not be liable for any of the decedent's debts or liabilities, excepting the

⁵ Stat. Tit. Admin. § 75.

⁶ Ib. § 76.

⁷ Stat. Tit. Admin. § 59. The expenses of administration are ranked in § 70 as of the fifth class. But that classification was intended for estates having more than enough property to satisfy the widow's award.

funeral expenses of the deceased. If, upon affidavit being filed with the clerk of said court, that such executor or administrator fails or refuses to report in any case provided for in this section, the court may order a citation and attachment to issue as in other cases of failure of administrators to report. And on a discovery of new assets, administration may be granted as in other cases, and charged to the account of the estate.⁸

CHAPTER XXVI.

OF THE SALE OF PERSONAL PROPERTY.

- § 328. Statutory provisions as to sale — time and place — notice — terms.—
Sale public, unless otherwise directed by the court.
329. Personal representative to act in good faith, and not responsible for inadequacy of price.
330. Where private sale is lawful.
331. Personal representative may sell and indorse a note belonging to the estate.
332. The power of one executor to dispose of personal assets.
333. Warranty of property by personal representative and breach may be shown in defense to a suit for the purchase money.
334. Personal representative has no right to buy at his own sale.
335. Where testator directs that his estate shall not be sold.
336. If sale of personal property not necessary it may be distributed, etc.
337. Growing crops not devised may be sold, or cultivated and sold at maturity. Comments.
338. Clerk and crier may be employed — compensation allowed by the court. Sales not made within specified hours, voidable.
339. Bill of sale to be made, under oath, and certified by the clerk and crier.

§ 328. The statute, section 91, provides for the sale of personal property as follows: When it is necessary for the proper administration of the estate, the executor or administrator

⁸ Ibid.

shall, as soon as convenient, after making the inventory and appraisement, sell at public sale all the personal property, goods and chattels of the decedent, when ordered so to do by the county court, not reserved to the widow, or included in specific legacies and bequests, when the sale of such legacies and bequests is not necessary to pay debts, upon giving three weeks' notice of the time¹ and place of such sale, by at least four advertisements, set up in the most public places in the county where the sale is to be made, or by inserting an advertisement in some newspaper published in the county where the sale is to be made, at least four weeks successively, previous thereto. The sale may be upon a credit of not less than six nor more than twelve months time, by taking note with good security of the purchasers at such sale. The sale may be for all cash, or part cash and part on time: *Provided*, that any part or all of such personal property, may, where so directed by the court, be sold at private sale.² (Form of Petition No. 42. Order of Court No. 43. Notice of Sale No. 44.)

§ 329. The statute requires the personal representative to sell the personal property of the decedent at public sale, but with a single exception, specified in section 94 (see post, § 337), does not authorize a private sale unless ordered by the court. And if he makes the sale in good faith, as directed by law, he is not responsible for any inadequacy of price which the property may bring. But if he should sell it at private sale, he would be answerable for any injury to those interested in the estate.²

§ 330. A personal representative may dispose of the personal estate or assets of the testator to a bona fide purchaser for a valuable consideration, and the contract will be obligatory, unless the purchaser knows or has good reason to suspect, that the sale is made with a design to misapply the funds, to the prejudice of those interested in the estate, and the purchaser is not bound to see to the application of the money. But if sold (as a note belonging to the estate was sold in this case), to pay

¹ See post, § 338, as to the hour of the day.

² See *Burnap v. Dennis*, 3 Scam. 478.

his own debt, and that fact is known to the purchaser, or if sold for a grossly inadequate price, such sale is fraudulent and void, as to those for whose benefit the estate or property is holden; and they may treat the personal representative as personally liable, or pursue the property into the hands of the purchasers.³

§ 331. The personal representative may indorse and sell a promissory note belonging to the estate so as to vest the legal interest in it, and authorize the holder to sue thereon in his own name.⁴

§ 332. One of two or more executors possesses the power to dispose of the personal assets of the testator as fully as when all join in the act of transfer. They have a joint and entire authority over the personal estate, and the *bona fide* acts of one in respect to that estate are binding upon the whole. They constitute in law but one person representing the testator, and the act of one is deemed to be the act of all. Thus, a term of years passes by the assignment of one of several executors. A release of a debt by one binds all. A sale of a chattel by one, transfers the title to the purchaser. And one executor may assign a promissory note made payable to the testator, so as to vest the legal interest in the purchaser.⁵

§ 333. If the personal representative warrants personal property of the estate sold by him, the maker of a note given for such property, may show in defense to a suit thereon a failure of consideration under the warranty.⁶

§ 334. It is a familiar and well understood principle that the personal representative has no right to become a purchaser at his own sale.

§ 335. Section 92 provides that, if any testator directs that

³ *McConnell v. Hodson*, 2 Gilm. 640; *Makepeace v. Moore*, 5 Gilm. 174; *Williams on Ex'rs*, 796.

⁴ *Makepeace v. Moore*, *supra*; *Stone v. Rawlinson*, Willes, 559; *Walker v. Craig*, 18 Ill. 116.

⁵ *Dwight v. Newell*, 15 Ill. 33, and authorities cited.

⁶ *Welch v. Hoyt*, 24 Ill. 117; *Ray v. Virgin*, 12 Ill. 216; *Rice v. Richardson*, 3 Ala. 438. As to administrators' covenants of title contained in a deed of land, see *Vincent v. Bertrand*, Breeze, 227, and cases cited, and notes.

his estate shall not be sold, the same shall be preserved in kind, and distributed accordingly, unless such sale becomes absolutely necessary for the payment of the debts and charges against the estate of such testator.

In such case it would be advisable for the personal representative to apply to the court for an order to make the sale.

§ 336. Section 93 provides that, if the sale of the personal property is not necessary for the payment of debts or legacies, or the proper distribution of the effects of the estate, the court may order that the property be preserved and distributed in kind.

§ 337. Section 94 provides that, if any executor or administrator is of opinion that it would be of advantage to the estate of the decedent to dispose of the crop growing, and not devised at the time of his decease, the same shall be inventoried, appraised and sold, in like manner as other property is sold; but the executor or administrator may, if he believes it would be of more advantage to the estate, cultivate such crop to maturity, and the proceeds of such crop, after deducting all necessary expenses for cultivating, gathering and making sale of the same, shall be assets in his hands, and subject to the payment of debts and legacies, and to distribution as aforesaid.

The last clause of the foregoing section evidently contemplates that the sale shall be private. The personal representative should therefore make such a true and full return to the court of his proceedings in the premises as to *prima facie*, at least, justify the court in approving of his acts.

§ 338. Section 95 provides that, in all public sales of such property, the executor or administrator may employ necessary clerks and a crier, who shall be allowed such compensation, not exceeding three dollars per day, as the court may deem reasonable, to be paid by such executor or administrator, and charged to the estate. All such sales shall be made between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of each day; and any sale made before or after the time herein limited, shall be voidable at the instance of heirs, devisees or creditors prejudiced thereby.

§ 339. Section 96 provides that, all executors and administrators shall, immediately after making such sales, make, or cause to be made, a bill of the sales of said estate, under oath, describing particularly each article of property sold, to whom sold, and at what price; which sale bill, when thus made and certified by the clerk of such sale and the crier thereof, if any such was employed, as true and correct, shall be returned into the office of the clerk of the county court in the like time as is required in cases of inventories and appraisements. (See Forms of Sale Bills Nos. 45, 46.)

CHAPTER XXVII.

PARTNERSHIP PROPERTY AND EFFECTS—RIGHTS AND DUTIES OF SURVIVING PARTNERS—RECEIVERS OF PARTNERSHIP EFFECTS.

- § 340. Rights of surviving partners in partnership property and business.
341. Primarily the administrator of a deceased partner has nothing to do with partnership assets.
342. Partnership property—how divided.
343. Surviving partner to make an inventory of the partnership estate, and cause it to be appraised.
344. Appraisers should be chosen for that special purpose.
345. Return of inventory and appraisal and list of liabilities to be made under oath to the court—time—penalty for neglect.
346. Surviving partner to continue in possession, pay debts, settle business, and pay over balance to personal representative.
347. Of waste by the surviving partner, and the remedy.

§ 340. The property and effects of a partnership do not belong exclusively to the surviving partner; but they are to be distributed between him and the representatives of the deceased partner in like manner as upon a voluntary dissolution of the partnership.¹ The death of a partner at once puts an end to

¹ Story Part. § 342.

the partnership, whether known to the survivor or not; and the survivor has no lawful right to expend the money of the firm, however necessary the expenditure may be, to carry on the business. If he does employ the assets of the firm in this manner, he takes the risk of all losses, but at the option of the representative of the deceased, may be compelled to account for the profits made thereby.² For some purposes the partnership is said to subsist after the death of a partner. The rights, duties, powers and authorities of the survivor remain, so far as is necessary to enable him to wind up and settle the affairs of the partnership. Upon the dissolution of a partnership by death, the surviving partner is entitled to close up the affairs of the firm. He therefore has a right to receive the debts due the partnership, and on the other hand, to apply the partnership assets and effects in discharge of the debts and other obligations due from it. However, where there is any danger of the abuse or positive misapplication of those funds by the surviving partner, a court of equity will interpose, and restrain it by injunction, and if necessary appoint a receiver, upon the application of the personal representative of the deceased.³

§ 341. Primarily the administrator of a deceased partner has nothing to do with the partnership assets or the partnership debts. The surviving partner takes the exclusive legal title to the former for the payment of the latter. If any assets remain in his hands after payment of all liabilities, he should account to the administrator for the distributive share of the deceased, which then becomes assets in his hands as administrator.⁴ If there is partnership property, and also separate property of a partner, the partnership debts are to be paid out of the proceeds of the joint estate. The joint creditors have no claim on the fund arising from the separate estate, until the individual debts are satisfied; and on the other hand the separate creditors can only seek payment out of the surplus of the

² *Ib.* 343; *Remick v. Emig*, 42 Ill. 342.

³ *Story Part.* § 344. The statute, as we shall presently see, has given a very extensive jurisdiction in these cases to the county court.

⁴ *Miller v. Jones*, 39 Ill. 54; see also *Remick v. Emig*, 42 Ill. 342.

partnership effects, after the satisfaction of the joint liabilities.⁵

§ 342. Upon the dissolution of a partnership by the death of one of the firm, the property is common, to be divided according to the shares of the partners, after the payment of the debts. This property is, first, the stock in trade as originally contributed, with all the additions made to it; second, real estate owned by the company, and, third, in certain cases, the good will of the business is regarded as part of the common stock. In taking an account between the partners themselves, the state of the stock is to be taken as at the death of one partner, and the proceeds thereof, until it is got in; and each partner is to be allowed whatever he has advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out more than his just proportion. The partners, if there is no agreement to the contrary, are to be allowed equal shares of the profits of the stock.⁶

§ 343. The statute, section 87, provides that, "In case of the death of one partner, the surviving partner or partners shall proceed to make a full, true and complete inventory of the estate of the co-partnership within his knowledge; and shall also make a full, true and complete list of all the liabilities thereof, at the time of the death of the deceased partner. He or they shall cause the said estate to be appraised in like manner as the individual property of a deceased person." (See Forms, Nos. 47, 48, 49, 50.)

§ 344. The section last quoted does not make it the duty of the appraisers of the individual property of the deceased to appraise that of the partnership, nor make it the duty of the personal representative to see that such appraisement is made. The surviving partner alone is required to cause the appraisement to be made, which would seem to imply that the appraisers, whether those appointed to appraise the individual property or others, should be specially appointed for that purpose.

⁵ Ladd v. Griswold, 4 Gilm. 25.

⁶ Remick v. Emig, 42 Ill. 342; see Mason v. Tiffany, 45 Ill. 392.

§ 345. Section 88 provides that, "He or they shall return, under oath, such inventory, list of liabilities and appraisement within sixty days after the death of the co-partner, to the county court of the county of which the deceased was a resident, or carried on the partnership business at the time of his death; if the deceased shall have been a non-resident, then such return shall be made to the county court granting administration upon the effects of the deceased. Upon neglect or refusal to make such return, he shall, after citation, be liable to attachment."

§ 346. Section 89 provides that, "Such surviving partner or partners shall have the right to continue in possession of the effects of the partnership, pay its debts out of the same, and settle its business, but shall proceed thereto without delay, and shall account with the executor or administrator, and pay over such balances as may, from time to time, be payable to him in the right of his testator or intestate. Upon the application of the executor or administrator, the county court may, whenever it may appear necessary, order such surviving partner to render an account to said county court; and in case of neglect or refusal may, after citation, compel the rendition of such account by attachment."

§ 347. And section 90 further provides that, "Upon the committal of waste by the surviving partner or partners, the court may, upon proper application, under oath, setting forth specifically the facts and circumstances relied on, protect the estate of the deceased partner, by citing forthwith the surviving partner or partners to give security for the faithful settlement of the affairs of the co-partnership, and for his accounting for and paying over to the executor or administrator of the deceased whatever shall be found to be due, after paying partnership debts and costs of settlement, within such time as shall be fixed by the court. The giving of such security may be enforced by attachment; or, upon refusal to give such security, the court may appoint a receiver of the partnership property and effects, with like powers and duties of receivers in courts of chancery; the costs of proceedings under this section to be paid by the executor or administrator, out of the estate of the

deceased or surviving partner, or partly by each, as the court may order.' (See Form Nos. 51, 52, 53.)

CHAPTER XXVIII.

CLAIMS AGAINST ESTATES.

PART I. OF PROVING THEM—WHAT ARE LEGAL CLAIMS.

- § 348. Personal representative to fix upon a term of court for adjustment of claims,— limitation — notice.
- 349. Presentation of claim — must be sworn to — if contested, how.
- 350. Delay for a long time a suspicious circumstance.
- 351. If claim not presented at the term selected, how to proceed.
- 352. Proceedings at the trial — costs.
- 353. Discretionary with the court to require claimant's oath that the claim is just, and unpaid. Comments.
- 354. Judgments and instruments in writing signed by the deceased — when considered proved.
- 356. Set off by the personal representative against a claim.
- 357. Claims not due — how disposed of.

¹ Previous to the enactment of the last four sections, in 1869, there was no statute regulating the inventory and accounting for partnership property, and there was no power to reach partnership property in the hands of surviving partners, and to compel such partners to settle with the personal representative of the deceased partner, except that exercised by courts of equity; which, if it could be said to be sufficient in any case, was always tedious and expensive. When a surviving partner was guilty of laches or bad faith, the administrator of the deceased partner might interfere by bill in equity. See *People v. White*, 11 Ill. 341.

The word "waste" in section 90, appears to have been used in a broad sense, and to include not only technical waste, but *devastavit*s, as where the surviving partner, acting as he does, in the capacity of a trustee, *directly abuses* his trust, by selling, embezzling or converting to his own use the goods of the firm remaining in his hands; or by *maladministration*, as, by paying claims not owing by the estate; or by *neglect* to collect and secure debts owing the firm, or to dispose of the goods within a reasonable time, or, if perishable, before they are wasted.

Technical waste may be committed in these cases by destroying the machinery of a mill or removing counters, shelving, doors and the like of buildings, destroying fences, etc.

§ 358. Appeal from the decision allowing or rejecting claim.—Bond.

359. Executions against real estate of decedent on judgments rendered against him.

360. Of the reversal of judgments by *scire facias* in such cases.

361. Effect of revival where the judgment had ceased to be a lien.

362. Personal representative having claim against the estate—how to proceed.

363. Cases and matters pending in the county court in which the judge is interested—how to proceed.

364. Claim to be presented within two years after grant of letters—effect if not presented.

365. Jurisdiction of the court not limited by the amount of the claim—its judgment *prima facie* evidence of the debt against the estate—heir may appeal—effect of appeal.

366. Persons interested may object to the allowance of claims when they are presented for probate.

367. And may do so upon an application of the personal representative for an order to sell lands.

368, 369. Jurisdiction of probate courts extends to the allowance of equitable claims against estates—how to proceed.

370. Services rendered for the benefit of the estate at the request of the personal representative, are to be paid for by the estate.

371. An attorney who is administrator is not entitled to charge the estate for professional services rendered by him.

372. Valid claims paid by persons interested, with intent to settle the estate without administration—the claims of such person may be allowed therefor.

373. Judgment against an administrator in one state, not evidence of indebtedness against another administrator of the same decedent in another state; not so a judgment against the decedent.

374. The personal representative appointed in this state cannot enter his appearance as such representative in another country, in a suit against the estate.

375, 376. Expenses of the funeral.

377. Expenses of a suitable monument, a proper charge against the estate.

378. Mourning apparel of family is not.

379. A defendant in a demand by the personal representative may be allowed in defense a set off, and have judgment for a balance due him.

380. Creditors may resort to other than probate courts in the first instance.

381. Personal representatives have power to submit claims against estates to arbitration.

382. Duty of personal representatives to interpose every lawful defense to claims against estates.—Remedy.

§ 348. The executor or administrator is required by section 60, to fix upon a term of court, within six months from the time he qualified as such executor or administrator, for the adjustment of all claims against the decedent, and give notice thereof in some public newspaper published in the county, or if no newspaper is published in the county, then in the nearest newspaper in this state, and also by putting up a written or printed notice on the door of the court house, and in five other of the most public places in the county, notifying and requesting all persons having claims against such estate to attend at said term of the court for the purpose of having the same adjusted,—such notice to be given at least six weeks previous to said term. (See Form No. 54, also Form of Proof of Publication, No. 55.)

§ 349. The same section provides that, the claimant shall produce his claim in writing; and if no objection is made by the executor or administrator, widow, heirs or other interested in the estate, and the claimant swears that such claim is just and unpaid, after allowing all just credits (see Form No. 56), the court may allow such claim without further evidence, but if objection is made thereto, it shall not be allowed without other sufficient evidence. The court may allow either party further time to produce evidence in his favor, and the case shall be tried and determined as other suits at law. Either party may demand a jury of either six or twelve men, to try the issue, and it is the duty of the clerk, when a jury is demanded, to issue a venire to the sheriff to summon a jury, to be composed of the number demanded.

§ 350. Delay in presenting a claim till three years after the death of the deceased is regarded as a suspicious circumstance, and may be given in evidence to the jury among other facts to rebut the plaintiff's claim.¹

§ 351. Section 61 provides that, if a claimant fails to present his claim for adjustment at the term of court selected by the executor or administrator, he may file a copy of the same

¹O'Connor v. O'Connor, 52 Ill. 316.

with the clerk of the court; and thereupon, unless the executor or administrator will waive the issuing of process, the clerk shall issue a summons, directed to the sheriff, requiring such executor or administrator to appear and defend such claim at a term of court therein specified, which summons, when served, shall be sufficient notice to the executor or administrator of the presentation of such claim. And section 62 provides, that if the summons is not served ten days before the first day of the term to which it is returnable, the cause must be continued until the next term of the court, unless the parties shall, by consent, proceed to trial at the return term.

§ 352. Section 63 provides that, upon the trial of such cause, the same proceedings may be had as if the claim had been presented at the time fixed for the adjustment of claims against the estate, but the estate shall not be answerable for the costs of such proceeding: *Provided*, that when defense is made the court may, if it shall deem just, order the whole or some part of the costs occasioned by such defense, to be paid out of the estate.

§ 353. Section 64 provides that, the court may, in its discretion, in any case, before giving judgment against any executor or administrator, require the claimant to make oath that such claim is just and unpaid: *Provided*, the amount of such judgment shall not in such case be increased upon the testimony of the claimant.

§ 354. Though the statute allows the oath, that the claim is just and unpaid, to be dispensed with in some cases, it is hard to conceive an instance where abuse might not creep in if this oath were not required, except where a judgment has been rendered in another court, *against the personal representative*. However just the claim may once have been, it may have been wholly or in part paid, without the knowledge of the administrator. Instances have occurred justifying these observations.

§ 355. Section 65 provides that, "A judgment regularly obtained, or a copy thereof duly certified and filed with the court, shall be taken as duly proven; and all instruments in writing signed by the testator or intestate, if the hand writing

is proven, and nothing is shown to the contrary, shall be deemed duly proved."

§ 356. Section 66 provides that, when a claim is filed or suit brought against an executor or administrator, and it appears on trial that the claimant or plaintiff is indebted to the executor or administrator, the court may give judgment therefor, and execution may issue thereon in favor of the executor or administrator.

§ 357. Section 67 provides that, where a claim is not due, the creditor may, nevertheless, present the same for allowance and settlement, and shall thereupon be considered as a creditor, and shall receive a dividend, of the decedent's estate, after deducting a rebate of interest for what he shall receive on his claim, to be computed from the time of the allowance thereof to the time his claim would have become due, according to the terms of the contract.

§ 358. Section 68 provides that, in all cases of the allowance or rejection of claims by the county court, as provided in this act, either party may appeal from the decision rendered, to the circuit court of the same county, in the same time and manner appeals are now taken from justices of the peace to the circuit courts, the appellant giving good and sufficient bond with security to be approved by the county judge; and such appeals shall be tried *de novo* in the circuit court. The statute, title Justices of the Peace, § 62, provides that, appeals from judgments of justices of the peace shall be taken within twenty days from the rendering of the judgment, and section 63 provides that, one or more of several plaintiffs or defendants may appeal. The penalty of the bond should be sufficient to cover all costs which have accrued, as well as those which would be likely to accrue in the circuit court.

§ 359. The statute, title Judgments and Decrees, § 39, provides that. "When a person shall die after the rendition of a judgment or decree for the payment of money against him is obtained in a court of record, execution may issue against the real estate of such deceased person, or sale may be made under such decree without reviving the judgment or decree against

his heirs or legal representatives: *Provided*, that no execution shall issue, or sale be made until after the expiration of twelve months from the death of such deceased person; nor shall any sale be had on any such execution or decree until the person in whose favor the judgment or decree is sought to be enforced shall give to the executor or administrator, or if there is neither, the heirs of the deceased, at least three months' notice in writing of the existence of such judgment or decree, before issuing execution or proceeding to sell.²

§ 360 In *Brown v. Parker*, 15 Ill. 307, it was held that, where either party to a judgment dies before execution is issued the judgment must be revived by *scire facias*, or execution must be issued in the mode pointed out by the statute; but unless one or the other course is pursued, an execution issued upon such judgment, and all proceedings under it, are absolutely void.

§ 361. The revival of a judgment against the personal representative, which had ceased to be a lien upon the real estate of the deceased before his death, does not create such a lien against such estate as will authorize an execution to issue for its sale; and a sale thereon is void.³ The proper order in such cases is, that the judgment be revived against the administrator, to be paid by him in due course of administration,⁴ But it would seem that where the defendant died within a year after the rendition of the judgment, and no execution is issued thereon in his lifetime, the lien of the judgment is preserved by section 37 (statute, title Judgments and Decrees), and may be

² The court in *Wight v. Wallbaum*, 29 Ill. 554, suggest that the proper form of execution in such a case would be to recite therein the fact of the recovery of judgment, the death of the defendant, and the notice to the administrator, and then specially command the sheriff that of the lands owned by the defendant at his death, in his county, he levy the amount of the judgment and costs. Foreign administrators have the power to sue out an execution on a judgment rendered in this state in favor of the intestate in his lifetime. *Keefer v. Mason*, 36 Ill. 406.

³ *Turney v. Young*, 22 Ill. 253; *Turney v. Gates*, 12 Ill. 141.

⁴ *Turney v. Gates*, 12 Ill. 141; *Welch v. Wallace*, 3 Gilm. 490.

enforced by execution under section 39, though it could not be issued within a year after the rendition of judgment.*

§ 362. Section 72 provides that, when an executor or administrator has a demand against his testator or intestate's estate, he must file the same as other persons are required to do; and the court will appoint some discreet person to appear and defend for the estate (see Form No. 57), and, upon the hearing, the court or jury shall allow his demand or such part thereof as shall be legally established, or reject the same, as shall appear just. Upon an appeal by the executor or administrator in such case, the court will appoint some person to defend as aforesaid, in the appellate court.

§ 363. Section 69 provides that, "In all cases or matters pending in the county court, when the judge of that court shall be interested in the same, or is a material and necessary witness, the case shall be transmitted to the circuit court of the proper county, and there determined as in the county court; and the papers, with the order or judgment of the circuit court thereon, shall be duly certified and filed in the county court, and have the same effect as if determined in the county court."*

§ 364. A party must present his claim within two years after the date of letters, and have it allowed, or he cannot become a distributee of the assets of the estate inventoried or accounted for by the personal representative after that period. Nor can he have any benefit of subsequently discovered assets, even in equity unless his claim has been allowed.⁶

§ 365. The statute does not limit the jurisdiction of the county court as to the amount of a claim which may be allowed by it against an estate.⁷ And its judgment allowing or

*Wight v. Wallbaum, 39 Ill. 554.

*The act of March 1, 1854, cited in Gross' Stat. 530 in relation to change of venue in county courts, is not repealed by the statute of 1872, but as sec. 69 provides fully for all the necessities of such cases no further notice of it will be taken.

⁶ Wingate v. Pool, 25 Ill. 118; Stone v. Clark, 40 Ill. 411, and cases cited; see post, §§ 404, 405.

⁷ Hanna v. Yokum, 17 Ill. 387. And the judgments of these courts are are final as to all matters within their jurisdiction. *Ib.* Stone v. Wood,

rejecting a claim against an estate is final as between creditor and personal representative, until reversed or impeached for fraud. And such a judgment is *prima facie* evidence of the existence of a debt against the estate, as against the heir, in proceedings for the sale of real estate to pay debts.* But the heir may appeal from the allowance of a claim, in which case he will, says *Caton, J.*, doubtless be bound by the judgment. But he loses none of his rights if he fails to appeal. He is not a party nor even a privy till he appeals, except so far as he has an interest in the personal estate, as being entitled to the residue of the payment of the debts.*

§ 366. We have seen by the statute, § 60, that objection may be made to the allowance of a claim by the widow, heirs¹⁰ or others interested in the estate, and if such objection is made, the claim cannot be allowed without other sufficient evidence besides the claimant's affidavit that it is just and unpaid. And doubtless the widow or creditors and legatees may appeal, as we have seen the heir may, from the judgment of the court allowing the claim.

§ 367. But upon an application by the personal representative for leave to sell lands to pay debts, the heir may contest the validity of the claims allowed against the estate. The judgment in such cases is not conclusive against him unless, as we have seen, he has appealed from it.¹¹

16 Ill. 177. The allowance of a claim is conclusive upon the personal representative and has the force and effect of a judgment until it is reversed. *Mason v. Bair*, 33 Ill. 194. And it is *prima facie* binding upon the heirs even if they neglect to appear and resist the claim. *Ib.*

* *Stone v. Wood*, 16 Ill. 177; *Hopkins v. McCann*, 19 Ill. 113; *Moline Water Co. v. Webster*, 26 Ill. 233; *Rosenthal v. Renick*, 44 Ill. 202.

* *Stone v. Wood*, 16 Ill. 177; *Mason v. Bair*, 33 Ill. 194.

¹⁰ Minors may appear before the county court by their guardian and contest claims against the estate of the ancestor, but should defend in the name of the administrator. *Mostinger v. Coleman*, 16 Ill. 71. If an appeal is taken by the claimant it brings the administrator only into court but the heir may still defend. *Ib.*

¹¹ *Stone v. Wood*, 16 Ill. 177; *Hopkins v. McCann*, 19 Ill. 113; *Moline Water Power and Mfg. Co. v. Webster*, 26 Ill. 234.

§ 368. The jurisdiction of probate courts extends to the allowance of equitable claims and demands for money, against the estates of deceased persons,¹² but is confined to those in which no party except such as are before the court has any interest, and where no conflicting claim exists. It does not, for example, extend to a case where a debt against a partnership is sought to be proved against the estate of a deceased partner, before the partnership assets and those of the surviving members have been exhausted,¹³ and real estate may be sold for their payment as in other cases.¹⁴ In *Moline Water Power Mfg. Co. v. Webster*, it was held, that debts against the firm of which the intestate was a member, after partnership assets have been exhausted, in payment of the firm debts, are equitable claims against the estate, subject to the individual debts of the deceased, all of which must be paid before any payment can be allowed upon the firm debts; and this should be provided for in the order of the probate court, upon the allowance of the claim against the estate. And no claim should be allowed against the estate, for a partnership debt, till it is shown that the partnership assets have been exhausted. (See Form No. 59.)

§ 369. In *Dixon v. Buell*, supra, the court, recognizing the jurisdiction of probate courts over equitable claims, for money against estates, held, in substance, that when a contract not assignable by law, so as to vest the legal title in the assignee and the right to bring suit in his own name, was assigned, the assignee, nevertheless, took an equitable title to the same, and might have his claim allowed by the probate court, in his own name.

§ 370. When a person renders services for the benefit of the estate of a decedent, at the instance of the personal representative, his claim for compensation is not a personal demand against such representative; but, on his death, may be enforced against such estate, in the hands of his administrator *de bonis*

¹² *Moore v. Rogers*, 19 Ill. 347; *Dixon v. Buell*, 21 Ill. 203.

¹³ *Pahlman v. Graves*, 26 Ill. 405.

¹⁴ *Moline Water Power Mfg. Co. v. Webster*, 26 Ill. 233; See *People v. Lott*, 36 Ill. 447.

non; for the acts of the personal representative rightfully done in his official character are binding on the estate he represents.¹⁶

§ 371. An attorney who is an administrator, is not entitled to an allowance against the estate for professional services which he has rendered in its settlement. Such services by him are regarded as a gratuity.¹⁶

§ 372. When valid claims against an estate have been paid in good faith, by one interested in the estate, thereby intending to settle the same without administration, his claim for the amount of such payments will be allowed against the estate.¹⁷

§ 373. A judgment against an administrator in one state is no evidence of indebtedness against another administrator of the same decedent in another state, for the purpose of affecting assets received by the latter under his administration. The suit should be upon the original cause of action.¹⁸ But a judgment against the deceased, wherever rendered, is made by the statute, sufficient evidence of indebtedness. A citizen of another state in which administration has been granted upon an estate, may come to this state and cause letters of administration to be taken out here, a claim to be allowed, and may have real estate sold for its payment; and in such case it is not necessary to show that the personal estate in the other state has been exhausted.¹⁹

§ 374. A personal representative appointed in this state cannot enter his appearance as such representative, in a suit brought in another country, upon a demand against the estate which he was appointed to administer. A judgment in such case cannot be admitted to probate, or be a ground of action in this state. Suit must be brought here on the original cause of action.²⁰

¹⁶ *Greene v. Grimshaw*, 11 Ill. 389.

¹⁶ *Willard v. Bassett*, 27 Ill. 37.

¹⁷ *Brearley v. Norris*, 23, Ark. 166.

¹⁸ *Rosenthal v. Renick*, 44 Ill. 202; *Story's Conflict of Laws*, § 522; *Judy v. Kelley*, 11 Ill. 211.

¹⁹ *Rosenthal v. Renick*, *supra*.

²⁰ *Judy v. Kelley*, 11 Ill. 211.

§ 375. The expenses of the funeral are a proper charge against the estate, and are privileged claims, being ranked by the statute as of the first class. In general there is no difficulty in determining upon what shall be included in these expenses. But there is a considerable diversity of opinion among courts upon some questions connected with this matter. Ordinarily those who direct the funeral expenses of a deceased person should be governed, to some extent, by the general opinion and expectation. Like matters of dress and furniture, it is to be regulated to some extent, by the feelings of friends and neighbors; which will conform to the general custom. And like anything else of this kind, it should, if possible, attract no attention either way, but should come precisely up to the demands of public decency, and in no particular overstep that safe limit. This will require a due regard to the age, standing, property and habits of life, and modes of living of the deceased, with many other circumstances which it would be difficult to enumerate.

§ 376. It is the duty of the executor, or some one on behalf of the estate, to see that the funeral rites of the deceased are decently performed, and to the extent of assets in his hands the personal representative is liable, in assumpsit, to pay the expense thus incurred.²¹ In another case in Massachusetts, it was held that where a person being at a distance from home, sent for his wife and other relatives, and they went to see him, but did not arrive until after his death, and the executor paid the expense of their journey, less than \$12, he should be allowed to charge the same in his account of administration.²²

§ 377. American courts have generally treated the cost of a suitable monument erected by the personal representative at the grave of the deceased, as a part of the funeral expenses, and a legitimate charge against the estate, especially where the

²¹ *Hapgood v. Houghton*, 10 Pick. 154; *Rappelyea v. Russell*, 2 Daly, C. P. 214.

²² *Jennison v. Hapgood*, 10 Pick. 77.

rights of creditors cannot be defeated thereby.²³ But in *Fairman's Appeal*, 30 Conn. 205, it was decided by the court that tombstones are properly a part of the funeral expenses, and, under the advice of the probate court, a reasonable sum may be used by the personal representative for that purpose, even where the estate is insolvent.

§ 378. A demand for mourning apparel furnished the widow and family of a deceased person, by direction of the executor, cannot be charged against the estate, as part of the funeral expenses.²⁴

§ 379. A defendant, in an action by a personal representative, may show in defense a set off, and if any balance is found in his favor, he may have judgment therefor, to be paid as in other cases.²⁵

§ 380. A creditor is not compelled to present his claim to the probate court for allowance, but he may resort in the first instance to the circuit court.²⁶

§ 381. The personal representative has no power to submit a claim against an estate to arbitration, and he cannot bind the estate by so doing. Claims must be presented to and allowed by the county court, before they can be legally paid out of the assets of the estate.²⁷

§ 382. It is the duty of the personal representative to interpose every lawful defense of which he is apprised to a suit against the estate. If he is delinquent in so doing, the heirs have a remedy on his bond.²⁸

§ 382a. Upon the probate of a claim, it draws interest, like an ordinary judgment.²⁹

²³ *Wood v. Vandenburg*, 6 Paige, 277; *Ferren v. Myrick*, 53 Barb. 76; *McGlensey's Appeal*, 14 Serg. & Rawle, 64.

²⁴ *Johnson v. Baker*, 2 Car. & P. 207.

²⁵ *Peacock v. Haven*, 22 Ill. 23.

²⁶ *Rosenthal v. Magee*, 41, Ill. 370; *Wells v. Miller*, 45 Ill. 33.

²⁷ *Reitzell v. Miller*, 25 Ill. 67.

²⁸ *Gold v. Bailey*, 44 Ill. 491.

²⁹ *Wheeler v. Dawson*, 63 Ill. 55.

CHAPTER XXVIII.

PART II. CLASSIFICATION OF CLAIMS.

§ 383. Claims classed by statute.

384. Claims allowed to be classed by the personal representative,—to be paid in the order of classification.

385. Duty of court to class demands, and file and preserve the papers. If claim is paid before allowance, proof to be made as in other cases.

§ 383. Section 70 provides that, "All demands against the estate of any testator or intestate shall be divided into classes, in the manner following, to-wit:

"*First*.—Funeral expenses.¹

"*Second*.—The widow's award, if there is a widow; or children, if there are children and no widow.

"*Third*.—Expenses attending the last illness, not including physician's bill.

"*Fourth*.—Debts due the common school or township fund.

"*Fifth*.—All expenses of proving the will, and taking out letters testamentary or of administration, and settlement of the estate, and the physician's bill in the last illness of the deceased.

"*Sixth*.—Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.

"*Seventh*.—All other debts and demands of whatsoever kind, without regard to quality or dignity." This section further provides for claims not exhibited to the court within two years from the grant of letters. The payment of all such are, with certain exceptions, postponed until the above mentioned classes are paid. (See post §§ 389, 404, 405.)

¹ See Widow's Award, ante, 327*a*., where, in one contingency, the funeral expenses and expenses of administration are preferred to the widow's award.

§ 384. Section 71 provides that, "All claims against estates, when allowed by the county court, shall be classed and paid by the executor or administrator, in the manner provided in this act, commencing with the first class; and when the estate is insufficient to pay the whole of the demands, the demands in any one class shall be paid *pro rata*, whether the same are due by judgment, writing obligatory or otherwise, except as otherwise provided."

§ 385. Section 73 provides that, the county court shall make an entry of all demands against estates, classing the same as above provided (in § 70), and file and preserve the papers belonging to the same. If an executor or administrator pays a claim before the same is allowed as aforesaid, the court shall require him to establish the validity of such claim by evidence similar to that required in other cases, before the same is classed, and he credited therewith.

CHAPTER XXIX.

LIMITATIONS

PART I. SPECIAL LIMITATION OF TWO YEARS.

§ 386. Duty of personal representative to interpose statute of limitations.

If not done heirs may do so on settlement.

387. The two kinds of limitations, and their effects.

389. Of the special limitation of two years, its effect.

390, 391. Special limitation runs from the date of letters, and continues to run.

392. Claims to which the special limitation applies — out of what estate to be satisfied.

393. Filing claim in court — when it prevents the bar of the statute. Cases cited.

394. If claim not barred by general statute of limitations, claimant is entitled to a judgment, to be paid out of subsequently discovered assets.

§ 395. When the claim depends upon the happening of a contingency which does not arise till after two years have elapsed, the special limitation applies.

396. The case of *Johnson v. Gillette*.—Special circumstances.

397. Notwithstanding the special limitation, the creditor may follow the estate into the hands of heirs and devisees.

§ 386. It is the duty of the personal representative to interpose the presumptions and positive limitations of the law against any claim presented for allowance, and coming within their purview.¹ And his failure to plead the statute of limitations will not bar or preclude the heirs from setting it up, on settlement with him.²

§ 387. There are two kinds of limitations to be kept in view by the personal representative, namely: 1. Those general limitations embraced in the statute entitled "Limitations," and which fix the period after a right of action accrues, beyond which, if a claimant brings suit thereon, the debtor or his personal representative may set up this statute in bar of the action; and 2. The limitation embraced in section 70, of the statute entitled "Administrators," which, without denying the right of the claimant in a suit brought after the limitation in the last named statute has expired, to have his claim allowed in the probate court, or to obtain a judgment therefor in any other court, confines him in the satisfaction of the same to such estate of the deceased as is not already inventoried or accounted for by the personal representative.

§ 389. The general limitation law, so far as it will be of consequence in this connection, is given hereafter (§ 398). The *special limitation* fixing the time within which claims may be produced, filed and prosecuted against estates, is contained in § 70, cl. 7 of the statutes, title Administration, and is as follows: All demands not exhibited as aforesaid, within two

¹ *McCoy v. Morrow*, 18 Ill. 519; *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484; *Brown v. Anderson*, 13 Mass. 201; *Thompson v. Brown*, 16 Mass. 172; ante, § 382.

² *Stillman v. Young*, 16 Ill. 318; *Nowell v. Nowell*, 8 Maine, 225; *Brown v. Anderson*, supra.

years from the granting of letters testamentary or of administration, shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator; in which case their claims shall be paid pro rata out of such subsequently discovered estate; saving, however, to femes covert, infants, persons of unsound mind, or imprisoned or without the United States in the employment of the United States or of this state, the term of two years after their respective disabilities are removed, to exhibit their claims. We have seen that the mode of presenting a claim against an estate is by presenting the same in writing, at the term of court fixed by the personal representative for adjustment of claims against the decedent, and making the oath prescribed by law, (ante § 349). But a claimant who fails to present his claim at such term may file a copy of the same with the clerk of the court and have summons against the personal representative, and have his claim adjudicated (see ante, § 351); which will avoid the limitation of two years.*

§ 390. The time in which claims against an estate may be presented, is to be computed from the date of the letters of administration, and not from the notice to creditors to exhibit them. And the omission of the personal representative to give such notice does not relieve the creditors from the necessity of presenting their demands. The statute operates whether the notice is given or not.^b When the statute of limitations begins to run it will continue to run till it operates as a complete bar, unless there is some saving qualification in the statute itself. Thus, where the personal representative died shortly after letters

* As to the meaning of "subsequently discovered estate." see post, §§ 403-405.

^b The present statute does not re-enact sec. 116, of the statute of 1845, Tit. "Wills," which permitted the service of notice of a claim on the personal representative or presenting him with the account, on which the decisions as to the manner of presenting the account and the effect thereof to prevent the two years' limitation were based in *Wells v. Miller*, 45 Ill. 33, and *Mason v. Tiffany*, Ib. 293.

^c *People v. White*, 11 Ill. 341; *Thrash v. Sumalt*, 5 Ala. 13; *Cawthorne v. Weisinger*, 7 Ala. 714; *Bank of Montgomery v. Plamett*, 13 Ala. 222.

were granted to him, and there was no administrator for a part of the two years, this did not prevent the creditors from exhibiting their claims against the estate, and thereby avoiding the operation of the statute. The creditors had the legal right to administer on the estate, and failing to exercise the right, they ought not to complain that there was no administrator.⁶

§ 391. In the case of *Shepard v. Rhodes*, decided at the June term, 1872, of the supreme court of Illinois (4 Leg. News, 453), the testator died in Pennsylvania, and without knowledge of his will, letters of administration were granted, in Illinois, to Quimby, which, upon the discovery of the will, were revoked, and letters with the will annexed were granted to Shepard: *Held*, the letters to Quimby were not void, and that the limitation of two years commenced to run from their date.⁷

§ 392. Creditors not excepted by sec. 70 of the statute, entitled Administration, who fail to exhibit their claims within two years after the grant of letters, are precluded from all participation in the estate inventoried or accounted for by the personal representative. Such claims must be satisfied out of the estate not so inventoried or accounted for.⁸ But if the personal representative does not return an inventory of, or account for the estate during the two years, such creditors are to participate equally with the other creditors in the proceeds thereof.⁹

§ 393. Filing of a claim in the probate court on the day appointed by the administrator for the adjustment of claims, and within two years from the granting of letters testamentary or of administration, will prevent the bar of the two years' statute of limitations in section seventy, notwithstanding there is no special order of continuance from term to term, and the claim is dropped from the docket of the probate court for sev-

⁶ Treat, C. J., in *People v. White*, 11 Ill. 341.

⁷ *Price v. Nesbit*, 1 Hill Ch. 445; *Woolley v. Clark*, 5 B. & Ald. 744.

⁸ *People v. White*, supra; *Sloo v. Pool*, 15 Ill. 47; *Wingate v. Pool*, 25 Ill. 118. In the latter case the claimant was administrator of the estate.

⁹ *Sloo v. Pool*, supra.

eral terms before final adjudication. But in such case the personal representative should appear before the court when the claim is adjudicated, or be served with summons, so that the court may have jurisdiction of his person.¹⁰ In this case, Mr. Justice *Lawrence*, alluding to the decision in *Propst v. Meadows*, 13 Ill. 157, says, "The point really decided was, that a claim which had been filed at the time appointed by the administrator, and which was not adjudged and not continued to a future term by express order, could not be taken up at a future term and allowed in the absence of the administrator, and without notice to him. In *Reitzeil v. Miller*, 25 Ill. 67, the court merely decided that the filing of the claim in the probate court, at a time not appointed by the administrator for the adjustment of claims, was not such a commencement of a suit as would stop the running of the general statute of limitations of five years. Neither decision covers the case at bar."

§ 394. A party bringing a suit against the personal representative, is entitled to a judgment, although his claim was not presented within two years after the date of letters of administration, if it was not otherwise barred by the general statute of limitations.¹¹

§ 395. Where the intestate had, in her lifetime, executed a bond of indemnity to another, the damages depending upon a contingency which did not happen until more than two years after the granting of letters of administration upon the obligee's estate; it was held that the obligee's claim did not accrue within the two years, and no suit could be instituted upon the bond within that time, and consequently his claim was barred, except as to property discovered and inventoried after the lapse of two years from the granting of the letters.¹²

§ 396. The case of *Johnson v. Gillette*, 52 Ill. 358, is somewhat remarkable considered with reference to circumstances permitted to excuse the delay to present the claim for allowance. Here more than twenty years had elapsed after letters of

¹⁰ *Barber v. Thurman*, 49 Ill. 283; *Wells v. Miller*, 45 Ill. 33.

¹¹ *Peacock v. Haven*, 22 Ill. 23; *Judy v. Kelley*, 11 Ill. 211.

¹² *Stone v. Clark's Admin.* 40 Ill. 411.

administration were granted, and the administrator presented a claim on his own behalf, against the estate, founded on a judgment obtained by him over twenty-two years before, against the intestate, and the estate was still unsettled; the court held that the claim was properly allowed, and that the land could be sold to pay it. But this case rests upon special circumstances, and does not seem to be referable to any well defined principle. Of like character is the case of *Clark v. Hogle*, ib. 427. The case of *Wingate v. Pool*, 25 Ill. 118, appears to be in conflict with these cases.

§ 397. But it must be observed that the two years' limitation does not apply so as to prevent the creditor from following the assets of the deceased into the hands of his heir or devisee, by a joint suit against the personal representative and the heir or devisee, under the 6th section of the statute of frauds, or by a separate action against the heir or devisee, under the 10th section of the same statute. Chief Justice *Treat*, in *Ryan v. Jones*, 15 Ill. 1, says, "This statute (of frauds) must be construed with reference to the 'chapter upon administration.' That chapter makes the personal estate primarily liable for the payment of debts. It must be exhausted before resort can be had to the real estate. Demands against the estate of a deceased person must be exhibited within two years from the grant of administration. A creditor free from disability, who fails to present his claim within that time, is not allowed to participate in the proceeds of the *personal* estate previously inventoried or accounted for by the executor or administrator. He must satisfy his debt out of property subsequently discovered or inventoried. In joint actions under the statute, the executor or administrator may insist upon this limitation of two years; and if he does so successfully, the plaintiff must take judgment against him, to be satisfied out of newly discovered estate. But heirs and devisees cannot rely upon this limitation. They may insist upon the general statute of limitations, and if successful, may wholly defeat a recovery against them."¹³

¹³ See *Stone v. Wood*, 16 Ill. 177; see also *Thomas v. Adams*, 30 Ill. 37; *Vansycle v. Richardson*, 13 Ill. 171.

The practice and form of judgment in these cases is very fully set forth in this case, and attention is particularly called to that fact.

CHAPTER XXIX.

LIMITATIONS.

PART II. GENERAL LAW OF LIMITATIONS.

§ 398. General statute of limitations.

399. A claim must be filed in the probate court, at the term fixed by the legal representative for adjustment of claims, and be followed by an adjudication at that term or regularly continued, etc., in order to be considered the commencement of a suit and save the bar.

400. Limitations as applied to set-off.

§ 398. For the purpose of convenient reference the following sections of the present general statute of limitations are inserted, which seem to be all that are of value in this connection. We have also noted some differences between the provisions of this statute and those in force prior to July 1, 1872, for the reason that, on general principles as well as by the saving clause of the present statute, actions which accrued under the former statutes, are still limited by their provisions. (See *Beesley v. Spencer*, 26 Ill. 216; § 24, Stat. Limitations.)

a. "§ 12. The following actions can only be commenced within the period hereinafter prescribed, except, when a different limitation is prescribed by statute."

b. § 14. This section relates exclusively to actions for slander and libel, which do not survive to or against the personal representative. The common law rule is that actions of *contract*, upon the death of either party, survive to or against the personal representative of each.¹ But an action for a breach of marriage contract is not within the rule.² In general, at com-

¹ 1 Ch. Pl. 68; 3 Bla. Com. 302.

² *Lattimore v. Simmons*, 13 S. & R. 183; *Stebbins v. Palmer*, 1 Pick. 71; 1 Ch. Pl. 51.

mon law, no action in form *ex delicto*, as trover, case, or trespass could be supported against the personal representative for an injury to personal or real property committed by the decedent. And in cases of injury to the person, as by assault and battery, false imprisonment, slander or otherwise, if either the party who received or committed the injury, dies, no action could be supported either by or against the personal representative. The remedy at once determines.*

c. But the statute, title Administration, § 123, provides that, "In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person, except slander and libel, actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions for fraud or deceit."

d. § 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, *or for a statutory penalty,*⁴ *or for abduction, or for seduction, or for criminal conversation,* shall be commenced within two years next after the cause of action accrued.

e. § 15. Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and in all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

f. § 16. Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment or

* 1 Ch. Pl. 90, 69.

⁴ The personal representative as such cannot sue upon a penal statute. 1 Ch. Pl. 21. And the remaining three causes of action mentioned in this section do not survive to him.

new promise to pay shall have been made, in writing on any bond, note, bill, lease, contract or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay.

g. By Act of 2d Session, 1849, p. 44, § 1, actions founded on notes, unsealed contracts in writing, bonds, *judgments*, or other evidences of indebtedness in writing, made, caused or entered into after the passage of that act, the limitation is sixteen years. And by § 2, actions founded upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied, were limited to five years after the cause of action accrued. § 3 subjects the limitation to conditions and restrictions contained in §§ 12 and 13, revised statutes, 1845, title Limitations, the first of which relates to the expiration of the limitations during the pendency of a suit in which judgment is reversed thereafter upon appeal, or in which judgment upon a verdict in favor of the plaintiff is arrested, or the plaintiff is nonsuited, and extends the time within which a new action may be commenced to one year after judgment reversed or rendered against the plaintiff, and the second, which relates to cases where the person against whom any of the causes of action specified in that chapter exists, shall be out of the state at any time during which suit might be sustained on such cause of action, and provides that suit might be brought against him after his return to the state, and the time of his absence from the state not accounted as part of the time limited by that chapter. (See *i.* § 18, post.)

h. § 17. A defendant may plead a set off or counterclaim, barred by the statute of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff, or person under whom he claims, before such set off or counterclaim was so barred, and not otherwise: *Provided*, this section shall not affect the right of a bona fide assignee of a negotiable instrument assigned before due.

i. § 18. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within

the time herein limited after his return to the state; and if, after his cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action.

j. § 19. If a person entitled to bring an action dies before the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies, before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executor or administrator after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

k. § 20. When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.

l. § 21. If the person entitled to bring an action, mentioned in the nine preceding sections, is, at the time the cause of action accrued, within the age of twenty-one years, or, if a female, within the age of eighteen years, or insane or imprisoned on a criminal charge, he or she may bring the action within two years after the disability is removed.

m. § 22. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards.

n. The 20th and 22nd sections are not found in any former statute, but the 21st may be compared with § 14 of the revised statute, 1845, which provides that the person having cause of action, if under the age of *twenty-one* years, insane or feme covert, he or she may institute such action within the time limited in the different sections of that chapter, after his or her becoming of full age, sane or feme sole. But it must be observed that

these exceptions are not included in the act of 1849 referred to, ante (g).

o. § 23. When the commencement of an action is stayed by injunction, or order of the court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not a part of the time limited for the commencement of the action.

§ 399. In the case of *Reitzell v. Miller*,⁵ a claim, on which the right of action accrued in the the lifetime of the decedent, was filed in the probate court, within two years after letters were granted, but no further steps were taken for nearly seven years thereafter. The general limitation applicable to such claims was five years, and the court held that the claim was barred by the general statute of limitations. The court said, "The filing of a claim in the probate court, *if it may be regarded as the commencement of a suit, so as to bar the running of the statute of limitations*, must be at the time fixed by the administrator for filing claims for adjustment. And it must also be followed by an adjudication at that term, or be regularly continued from term to term until it is passed upon by the court. If it is not so acted upon or continued, a discontinuance takes place, and the cause is no longer in court. *Propst v. Meadows*, 13 Ill. 157. After it is thus discontinued, to again become a pending suit the administrator must be brought into court," by his voluntary appearance there or by summons, as now provided in section 61 of the statute. This case being taken as a true exposition of the law, it would follow, that filing a copy of a claim with the clerk of the county court, at any other time within the two years, will not arrest the general statutes, unless the personal representative will waive the issuing of process, or unless summons is issued, under the provisions of section 61, and the cause is regularly continued from term to term until adjudicated.

§ 400. A plea of set-off is nothing more or less than a cross action, and if in the action the claimant would not be barred, of a recovery, so neither can he be barred from pleading his set-off to an action by the personal representative.⁶

⁵ 25 Ill. 67.

⁶ *Peacock v. Haven*, 22 Ill. 23.

CHAPTER XXX.

FORM OF JUDGMENT.

- § 401. No particular form is in general necessary, where the judgment is rendered by the county court.
402. Must direct that it be satisfied in due course of administration, if rendered by any other court.
403. Where the special limitation applies—form.
- 404, 405. Estate inventoried and accounted for within two years, is such as the personal representative within that time inventoried or charged himself with in any settlement.
406. Form where the claim is against a partnership.
407. Judgment against an administrator for costs, must be against him in his representative capacity.

§ 401. No particular form is necessary for a judgment by the county court, allowing or rejecting a claim.¹ It is sufficient if so worded as to be understood. If the claim is allowed, it will be deemed to be payable out of the estate inventoried or accounted for. But if not exhibited to the county court at the time fixed by the personal representative for the adjustment of claims, or filed with the clerk so as not to be barred by the two years' limitation, the judgment allowing it should direct that it be satisfied in due course of administration, out of property belonging to the estate of the deceased, not inventoried or accounted for by the executor or administrator,² within two years from the grant of letters of executorship or administration.³

§ 402. Where a judgment against an estate is rendered by any other than the county court, it should direct that it be satisfied in due course of administration.⁴ And if the two years'

¹ Johnson v. Gillette, 52 Ill. 358.

² Bradford v. Jones, 17 Ill. 93. See Form No. 58.

³ Stone v. Clark, 40. Ill. 411; Sloo v. Pool, 15 Ill. 47.

⁴ Welch v. Wallace, 3 Gilm. 490; Wells v. Miller, 45 Ill. 33. But a judgment awarding an execution is erroneous, and will be reversed on appeal. Peck v. Stevens, 5 Gilm. 127; Welch v. Wallace, supra; Bull v. Harris, 31 Ill. 487.

limitation bars it as against the estate inventoried or accounted for, the judgment should also direct its satisfaction to be made out of property belonging to the estate, not inventoried or accounted for by the executor or administrator, within two years from the grant of letters of executorship or administration, and dispose of the costs, by ordering that the plaintiff pay them.

§ 403. In *Bradford v. Jones*,⁶ where the only question directly under consideration by the court was, what is subjected by the statute to a judgment to be satisfied out of the estate of the deceased not inventoried or accounted for by the personal representative, Justice *Caton* said, "The test prescribed by the statute is, whether it has been inventoried or accounted for by the executor or administrator." And he rejects the test whether the estate was previously known to or discovered by the personal representative or not. He also says, "It is a matter of no moment, and can make no difference with the creditor's rights, whether the estate not inventoried is discovered before or after he obtains his judgment, or even the commencement of his suit, or even whether he himself first finds such property."⁶

⁶ *Supra*.

⁶ There are several other decisions of the supreme court of Illinois bearing upon the form and effect of the judgment, but their language is less specific, though not in conflict with the case of *Bradford v. Jones*, when considered with reference to the real question before the court. Thus in *Thorn. v. Watson*, 5 Gilm. 26, where the words used are, "that might afterwards be found"; in *Judy v. Kelley*, 11 Ill. 211, "assets thereafter to be discovered;" in *People v. White*, 11 Ill. 341, "subsequently discovered estate;" *Ryan v. Jones*, 15 Ill. 1, "subsequently discovered or inventoried," and "*personal estate* previously inventoried or accounted for;" *Stillman v. Young*, 16 Ill. 318, "estate inventoried;" *Peacock v. Haven*, 22 Ill. 23, "actually inventoried," "subsequently discovered and inventoried," "assets to be discovered and inventoried," "estate inventoried;" *Sloo v. Pool*, 15 Ill. 47, "any personal estate discovered or inventoried after the expiration of two years." Treat, C. J., says in this case, "The administrator did not return an inventory of the real estate within two years from the grant of administration. The real estate was therefore not inventoried or accounted for during that period of time; and Pool is consequently entitled to participate equally with the other creditors in the proceeds thereof. He is also entitled to share in the proceeds of any personal estate discovered or inventoried *after the expiration of two years*. The court erred in confining

§ 404. Upon the question what assets of the deceased are meant by the statute to be excluded from those inventoried and accounted for by the personal representative, and which are consequently liable for the payment of debts barred by the two years' limitation, the case of *Stone v. Clark*, 40 Ill. 411, having turned upon this point, is authoritative, and declares that the judgment in a case where the two years' bar is sustained, should not confine the claimant to assets which might be discovered and inventoried after rendition of the judgment, instead of to such assets as might be discovered and inventoried after the lapse of two years from the granting of letters of administration. Of the same import is the case of *Sloo v. Pool*, 15 Ill. 47

§ 405. Upon the import of the words "accounted for" we have no authoritative adjudication; but it is probable that the legislature meant by these words to include such estate as the personal representative may have charged himself with in his account current or settlement with the court, but which having been omitted from the inventory, or come to his knowledge after the inventory was filed, has not been reported to the court in the form of an additional inventory.

§ 406. Where the judgment is for a debt of a partnership of which the deceased was a member, it should direct that it be satisfied in due course of administration, but out of such estate only of the deceased as remains after paying his individual debts and the costs of administration.⁷ (See Form No. 59.)

§ 407. Judgment against an administrator for costs must be rendered against him in his representative capacity.⁸ The statute, section 126, provides that, no executor or administrator or his security, shall be chargeable beyond the assets of the testator or intestate, by reason of any omission or mistake in pleading, or by false pleading of such executor or administrator.

Pool, in the satisfaction of his judgment, to assets discovered or inventoried subsequent to the filing of his claim."

⁷ *Moline W. P. M. Co. v. Webster*, 26 Ill. 233.

⁸ *Church v. Jewett*, 1 Scam. 55; *Gibbons v. Johnson*, 3 Scam. 61; *Hunter v. Bilyeu*, 39 Ill. 368.

CHAPTER XXXI.

COLLECTION OF ASSETS.

§ 408. Duty of personal representative to collect assets.

409–411. Extent of his liability.

412. Where property is wrongfully detained, or concealed or embezzled, or persons have knowledge of such facts, citation may issue, etc.

413. This proceeding not designed to aid in the mere collection of debts due the deceased.

414. If the person cited refuses to answer, or to deliver up goods,—proceedings stated.

415, 416. Of sale and compounding desperate and doubtful claims. Rights of purchaser.

417. Of sale and compounding debts due at a distant period.

418. Property of a decedent coming from a foreign jurisdiction into the state of his domicile, vests in the administrator in the latter place.

419. Personal representatives may receive debts due decedents from parties residing abroad — when.

420. Personal representatives may sell and endorse notes belonging to the decedent—the effect.

421. He may proceed by distress for rent due the deceased.

422. He must sue for and collect damages for the death of decedent, caused by wrongful neglect, etc.

423. May cause executions to be issued on judgments in courts of record in favor of deceased—the proceedings.

424, 425. Same subject continued.

426. Personal representatives may bid for land when sold on judgments in favor of the decedent.

427. A chattel real when purchased at such sale by the personal representative is assets; and rents derived from lands purchased in payment of debts must be accounted for as assets.

428. Rights of administrators *de bonis non* and others aggrieved to call upon removed administrators to account, stated, and the difference between their rights and those of a representative of a deceased administrator stated.

§ 408. It is the duty of the administrator to reduce the assets to money and report the same to the court, to be paid upon debts and distributed among the parties entitled thereto.¹

¹Johnston v. Maples, 49 Ill. 101.

§ 409. Personal representatives acting in good faith in the collection of debts due their intestates, exercising proper vigilance, directed by a reasonable judgment, ought not to be charged with debts they have failed to collect.² But they are *prima facie* liable for all the claims they have inventoried without comment, or as good.³

§ 410. Where an administrator had notes due to his intestate from one living in another state, and placed them in the hands of an agent for collection, and the agent was a man of standing and property at the time, but afterwards, having used the money collected, became insolvent: *Held*, that the administrator was not liable for the loss. He had used proper diligence, and acted with ordinary care, and therefore would not be held liable for the loss to the estate. But the court expressed a doubt if it was the administrator's duty to collect the notes in another state.⁴

§ 411. We have seen that, by section 58 of the statute, the personal representative is chargeable with so much of the real and personal estate of the decedent, as he, after due diligence, did or might receive. And we shall hereafter see that, by section 114, all moneys, bonds, notes and credits which the personal representative may have in his possession or control as property or assets of the estate, at a period of two years and six months from the date of his letters, shall bear interest and he shall be charged interest thereon from that period at the rate of ten per cent., or after two years and six months from any subsequent time that he may have discovered and received the same, unless good cause is shown to the court why such should not be taxed. The latter section is first found in the statute of 1872, and was intended to insure diligence in collecting assets.

² *Rowan v. Kirkpatrick*, 14 Ill. 1. In this case Trumbull, J., said—"It ought to be made satisfactorily to appear that the debtor had property liable to execution, and that the personal representative must probably have known the fact, and still carelessly neglected to coerce payment."

³ See ante, § 278.

⁴ *Christy v. McBride*, 1 Scam. 75.

§ 412. The statute of 1872, section 81, as amended by the act of 1873, provides that, if any executor or administrator, or other person interested in any estate, shall state upon oath to any county court, that he believes that any person has in his possession, or has concealed or embezzled any goods, chattels, moneys or effects, books of account, papers or evidences of debt whatever, or titles to land belonging to any deceased person; or that he believes that any person has knowledge or information of or concerning any indebtedness or evidences of indebtedness, or property titles or effects, belonging to any deceased person, which knowledge or information is necessary to the recovery of the same, by suit or otherwise, by the executor or administrator, of which the executor or administrator is ignorant, and that such person refuses to give to the executor or administrator such knowledge or information, the court shall require such person to appear before it by citation, and may examine him on oath, and hear the testimony of such executor or administrator, and such other evidence offered by either party, and make such order in the premises as the case may require. (See Forms Nos. 60, 61.)

§ 413. Under the section in the revised statutes of 1845, from which the first seven lines of the foregoing section were copied, it was held in *Williams v. Conly, admr.*,⁵ that the proceeding authorized thereby was not designed to aid in the collection of debts due to the estate; but for the purpose of obtaining possession of the identical property or money which belonged to the deceased in his lifetime.

§ 414. Section 82 provides that, "If such person refuses to answer such proper interrogatories as may be propounded to him, or refuses to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof, upon a requisition being made for that purpose by an order of the said court, such court may commit such person to jail until he shall comply with the order of the court therein." (See Form No. 62.)

§ 415. The statute, section 83, provides that, "Upon suggestion made by an executor or administrator, to the county

⁵ 20 Ill. 643.

court, that any claim, debt or demand whatever belonging to the estate in his hands to be administered, *and accruing in the lifetime of the decedent*, is desperate on account of the insolvency or doubtful solvency of the person or persons owing the same, or on account of the debtor having availed himself of the bankrupt laws of the United States, or on account of some legal or equitable defense which such person or persons may allege against the same, or for the cause that the smallness of such claim, debt or demand, and the difficulty of finding the debtors owing to the remoteness of their residence, or the executor's or administrator's ignorance of the same, the said court may order such claim, debt or demand to be compounded or sold, or to be filed in the said court for the benefit of such heirs, devisees or creditors of such decedent as will sue for and recover the same, giving the creditors the preference, if they or any of them apply for the same before the final settlement of such estate: *Provided*, that no order for the sale or compounding of any such debts, claims or demands, or any of them shall be made until two weeks' public notice shall be given to all whom it may concern, of the time and place when the said order will be applied for; which notice shall be given by the administrator or executor, in a newspaper published in the county where such application is to be made, or if no such newspaper is published in such county, then by posting up such notices in not less than three public places in the county, of which one shall be at the office of the clerk of the county court; which notice shall be published at least two weeks previous to the time of said application. The executor or administrator shall report to the said county court, for its approval, the terms upon which he has settled or disposed of any such claim, debt or demand. (For Forms under this section, see Nos. 63, 64, 65, 66.)

§ 416. Section 84 provides that, "If such claim is compounded or sold, such executor or administrator shall be chargeable with the avails of such compounding (or sale), and if the same is taken by any of the creditors, heirs or devisees, he or they may maintain an action for the recovery thereof in the name of such executor or administrator, for the use herein-

after mentioned; and upon recovering the same or any part thereof, he or they shall be chargeable therewith, after deducting his claim or distributive share, with reasonable compensation for collecting the same; and upon such suits the executor or administrator shall not be liable for costs."

§ 417. Section 85 provides that, "The county court may order claims, debts and demands due at so remote a period as to prevent their collection within the time required for the final settlement of estates, and the collection or disposition of which is necessary to the payment of debts against the estate, to be compounded or sold in the same manner and upon like conditions as though such claims, debts or demands were desperate or doubtful: *Provided*, that no such claim, debt or demand shall be sold or compounded for less than ten per cent. below the value thereof." (See Forms under § 415.)

§ 418. The property of a decedent coming from a foreign jurisdiction into the state of his domicile immediately vests in the administrator there, if administration has not been taken out in such foreign jurisdiction.⁶ But he has no title to the property of the deceased situated in another country. He has no authority over it, nor is he responsible for any effects of the estate which may be beyond the limits of the jurisdiction appointing him. He cannot be sued out of the country from which he derives his authority and to which he is alone amenable; nor can he sue in the courts of another country, unless permitted so to do by the local law of the place. If he wishes to reach property, or collect debts belonging to the estate in a foreign country, he must there, unless otherwise provided by statute of such country, obtain letters of administration, and give such security, and become subject to such regulations as its laws may prescribe.⁷

⁶ Wells v. Miller, 45 Ill. 382. The facts in this case were these. The decedent was domiciled in Illinois, and died on the Missouri shore, while taking lumber by river from Illinois to Tennessee; he had no other assets, nor any creditors in Missouri or Tennessee, and the defendant, who was charged with wrongfully taking the lumber, resided in this state, and the administratrix, residing in this state brought suit in trover.

⁷Judy v. Kelley, 11 Ill. 211.

§ 419. But an administrator may, independent of statutory regulations, receive payment of a debt due the decedent from one living in another state, and his release thereof will be valid, even if administration has been granted in the state of the debtor's residence, and where the debt was paid, provided there were no creditors or distributees residing in that state.⁸

§ 420. We have already seen that the personal representative may sell and endorse a promissory note belonging to the estate, so as to authorize the holder to sue thereon in his own name.⁹ So he may endorse bills made payable to the decedent.¹⁰ But it is entirely well settled, that he cannot sell the assets of the estate in payment of his own debt, that being known at the time to the creditor.¹¹ (See further on this subject, ante, §§ 330-332.)

§ 421. The remedy by distress for rent lies in favor of the personal representative, for rent due before the death of the deceased.*

§ 422. It is the duty of the personal representative to sue for and collect damages, where the death of the deceased was caused by the wrongful act, neglect or default of any other person. (For principles governing this class of claims, see post, §§ 429, 432.)

§ 423. The statute, title Judgment and Decrees, § 37, provides that, "The collection of a judgment or decree of a court of record shall not be delayed or hindered, or the lien created by law abate, by reason of the death of any person in whose favor such judgment or decree shall be; but the executor or administrator, or, if the decedent was an executor or administrator, the administrator *de bonis non*, or with the will annexed, may cause his letters testamentary or of administration to be recorded in such court, after which execution may issue and proceedings be had in the name of the executor or administra-

⁸ Wilkins v. Elletts, 9 Wallace, 740.

⁹ Makepeace v. Moore, 5 Gilm. 474; Walker v. Craig, 18 Ill. 116.

¹⁰ Stone v. Rawlinson, Wills, 559.

¹¹ Doe v. Fallows, 2 Crompt. & J. 481; Rhame v. Lewis, 3 Rich. Eq. 269

* 3 Redf. Wills, § 31, pl. 4.

tor as such, in the same manner as if the judgment or decree had been recovered in his name."

§ 424. The foregoing section was intended to save the expense and delay of a *scire facias* to revive the judgment, or bill in equity to revive the decree. In *Durham v. Heaton*, 28 Ill. 264, it was held that an execution issued upon the filing of the letters in the court was valid, even though such letters were not recorded. It was, observes the court, the duty of the administrator to bring them into court to show his character of executor or administrator, and it was the clerk's duty to record them. But if the clerk failed so to do, the personal representative should not suffer or be put in peril. And the court remarks upon the form of the execution in that case, that it would be proper to contain a recital to this effect; which A. B. in his lifetime recovered against C. D., and which judgment has been revived in the name of E. F., administrator, etc.

§ 425. In *Brown v. Parker*, 15 Ill. 307, it was held that, where either party to the judgment dies, before execution issues, the judgment must be revived by *scire facias*, or execution must be issued in the mode pointed out by the statute; but unless one or the other course is pursued, an execution issued upon such judgment, and all proceedings under it, will be absolutely void.*

§ 426. The statute, title Judgments and Decrees, § 38, provides that, "When it is necessary, in order to secure the collection of a judgment or decree belonging to any estate, it shall be the duty of the executor or administrator to bid for and become the purchaser of real estate at the sale thereof by the sheriff, master in chancery or other officer. The premises so purchased shall be assets in his hands, and may be again sold by him, with the approval of the county court, and the moneys arising from such sale shall be accounted for and paid over as other moneys in his hands."

§ 427. Chattels real — which are estates for years however long — when purchased by the administrator in payment of a judgment in favor of the estate, are assets.¹² And if he pur-

¹² *Creel v. Kirkham*, 47 Ill. 118; and see *Willenborg v. Murphy*, 36 Ill. 344.

* See also Stat. 1874, p. 625, § 27.

chases lands in payment of debts, he must account to the distributees for the rents received by him, after deducting taxes, necessary repairs, and other proper charges and debts of the deceased.¹³

§ 428. An administrator *de bonis non*, appointed to succeed an administrator whose letters have been revoked,¹⁴ or any other person aggrieved, has authority to call upon the removed administrator to account fully for his administration of the estate; and may maintain all necessary actions for the purpose, and may moreover make him answer in damages, for any maladministration of the estate.¹⁵ But the representative of a deceased administrator cannot be called upon by an administrator *de bonis non* to account for assets already administered by such deceased administrator; but this may be done by heirs and distributees.¹⁶ In such case the power of an administrator *de bonis non* extends only to the recovery of such goods and chattels of the intestate as remain unadministered in specie, and to debts due the intestate which remain unpaid. His authority does not extend to assets already administered.¹⁷ He cannot maintain an action on a note given to the former administrator for money due the estate;¹⁸ nor against the attorney of the former administrator for money collected by him on a note belonging to the intestate which was placed in such attorney's hands for collection by the former administrator.¹⁹

¹³ Kruse v. Steffens, 47 Ill. 112.

¹⁴ The acceptance by the probate court of the resignation of an administrator, amounts to a revocation of his letters, Marsh v. The People, 15 Ill. 284.

¹⁵ Ibid.; Duffin v. Abbott, 48 Ill. 17. The latter case overruling Stose v. Stose, 25 Ill. 600; and Short v. Johnson, ib. 489. In the first case there was a revocation of the letters and in the other a resignation which was accepted by the court.

¹⁶ Rowan v. Kirkpatrick, 14 Ill. 1; Newhall v. Turney, 14 Ill. 338; Marsh v. People, supra; Duffin v. Abbott, supra.

¹⁷ Newhall v. Turney, supra.

¹⁸ Ibid. Barker v. Talcott, 1 Vernon, 473; Oglesby v. Gilmore, 5 Georgia, 56.

¹⁹ Sloan v. Johnson, 14 Smedes & M. 47.

CHAPTER XXXII.

OF THE RECOVERY OF DAMAGES FOR CAUSING DEATH BY NEGLIGENCE.

- § 429, 430. The personal representative of the deceased must bring suit in these cases, and the damages go to the widow and next of kin.
431. Husband is entitled to damages in case the wife is killed. Money recovered is not treated as a part of the estate of the deceased, and is not liable for his debts,—nor does it pass by the provisions of a will.
432. Personal representative may control the suit, and compromise it. He is liable on his bond for the money received.

§ 429. In addition to the ordinary duty of the personal representative to collect claims and demands which were owing to the deceased, the act of 1853,¹ entitled “An act requiring compensation for causing death by wrongful act, neglect or default,” imposes upon him the duty of bringing suit for damages caused to the widow and next of kin of a person killed by wrongful act, neglect or default of others. No other person has power to bring such an action. The damages recovered in such case go to the widow and next of kin exclusively, and not to creditors and legatees, and hence the rules of distribution of the effects of the deceased are not in any respect changed by this act.

§ 430. Section 1 provides, “That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person

¹ Laws of 1853, p. 97; Gro. Stat. 60.

injured, and although the death shall have been caused under such circumstances as amount in law to felony." And section 2 provides that, "Every action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: *Provided*, that every such action shall be commenced within two years after the death of such person."

§ 431. This statute first came before the supreme court for construction, in the case of *The City of Chicago v. Major*, 18 Ill. 349. The deceased—a child four years of age, fell into a water tank, constructed by the city, and was drowned, and it was held, that the action is not limited to those cases where the deceased leaves a widow; that a husband may have redress for the loss of a wife; and orphans, where both parents are killed; that the action is to be brought by the executor or administrator of the deceased. It was also held, that the damages under this act can only be for pecuniary loss, not for the bereavement, and that the jury must make their estimate of such pecuniary damage from the facts proved, and that it is not necessary that any witness should have expressed an opinion of the amount of such pecuniary loss; that in such, as in all other cases, it is proper for the jury to exercise their own judgment upon the facts proved, by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind. It was also held, that the money recovered should not be treated as a part of the estate of the deceased; that creditors were excluded from any benefit of it, and that it did not pass by virtue of any provisions of the will of the deceased; in short, that it should be distributed

among those to whom his personal estate, remaining after payment of his debts, and in the absence of a will, would descend.²

§ 432. The personal representative having instituted a suit under this statute has a right to control its prosecution and disposition, and to compromise it.³ But of course he must act in good faith and exercise a reasonable degree of judgment in making such a compromise. And he is liable on his bond for the proceeds of a suit under this statute, and it would make no difference with this liability if the damages were voluntarily paid by the person liable for the injury.⁴

CHAPTER XXXIII.

OF WASTE BY THE WIDOW.

§ 433. Statutory provision defining her liability and that of her subsequent husband.

§ 433. The statute, title Administration, sec. 80, provides that, "If the widow commits waste in the lands and tenements, or the personal estate of the deceased, she shall be liable to an action by the heir or devisee, or his or her guardian, if of real estate, or by the executor or administrator if of personal estate; and if she marry a subsequent husband, he shall be answerable with her, in damages, for any waste committed by her or by the husband himself, after such marriage."

² This case and that of *C. B. & Q. R. R. Co. v. Triplett*, 38 Ill. 482, contain other points of interest to counsel in these cases.

³ *Henchy v. City of Chicago*, 41 Ill. 136

⁴ *Goltra v. People*, 53 Ill. 234.

CHAPTER XXXIV.

RIGHTS AND DUTIES OF ADMINISTRATORS RESPECTING
REAL ESTATE.

§ 434, 435. What administrators may and may not do with real estate.
General principles.

§ 434. Administrators and such executors as have not, by the terms of the will, any special rights given them in or to the real estate of the decedent, or any duty enjoined in respect thereto, take no title to, or estate, right or interest in, the realty.¹ They have no right to the rents, except such as were due in the lifetime of the deceased.² They are not required to pay the taxes.³ They have no power to remove clouds from the title,⁴ nor to apply to a court of chancery to reform a deed made to the intestate in his lifetime,⁵ where there was a mistake in the description of the land intended to be conveyed,⁶ or to remove an adverse title;⁷ nor to proceed in equity to set aside a voluntary conveyance—creditors only can do this⁸—or make a partition of land owned by the intestate and another,⁹ nor sell or encumber it without an order of the court therefor.¹⁰ Such lands, except those included in a voluntary conveyance, descend to the heirs or are taken by the devisees, as

¹Smith v. McConnell, 17 Ill. 135; Stone v. Wood, 16 Ill. 177; Walbridge v. Day, 31 Ill. 379; Phelps v. Funkhouser, 39 Ill. 401.

²Ante, § 292.

³Stone v. Wood, Phelps v. Funkhouser, supra.

⁴Smith v. McConnell, supra; Cutter v. Thompson, 49 Ill. 401; Phelps v. Funkhouser, supra.

⁵Foltz v. Prouse, 17 Ill. 487.

⁶Shoemate v. Lockridge, 53 Ill. 503.

⁷Gridley v. Watson, 53 Ill. 186.

⁸Choteau v. Jones, 11 Ill. 300. See McDowell v. Cochran, ib. 31; Alexander v. Tams, 13 Ill. 221.

⁹Williams v. Wiggand, 53 Ill. 233.

¹⁰Stillman v. Young, 16 Ill. 318.

the case may be, subject to the payment of the debts of the deceased.¹¹ Though as to lands devised, the last remark must be qualified; for if they were encumbered *by the testator*, his personal and other estate is first liable for the discharge of the same; but if encumbered by a prior owner, the devisee must discharge it.¹²

§ 435. The personal representative takes only a power, and not an interest,¹³ and he cannot exert this power (which is that of sale or to mortgage or lease), except to raise a fund for the payment of debts of the deceased, and under an order of court therefor. The only cases in which the personal representative is required to intermeddle with, or even notice the existence of the real estate, are the following: He must inventory it. (Stat. title Administration, §§ 51, 52.) He may, upon obtaining an order of the court, sell it, to pay general indebtedness. (§ 97, etc.) And he may, where the estate is insolvent, and upon a like order, sell land to make the uncompleted payment therefor. (§ 111.) And he (an executor, only,) may mortgage or lease land, by order of the court, to raise a fund for the payment of debts due from the estate. (§ 120.) And he may petition to the court for an order to convey lands sold but not conveyed by the decedent, when payment has been fully made. (Stat. title Contracts, § 4.) The *administrator* may redeem lands of the deceased from sale upon an execution or decree. (Stat. 1872, title Judgments and Decrees, § 18.) The word *executor* is omitted in this statute, though it was in § 13, R. S. 1845, title Judgments and Executions, from which it was copied.

¹¹ Vansyckle v. Richardson, 13 Ill. 171; Walbridge v. Day, 31 Ill. 379.

¹² 3 Redf. Wills, § 43, pl. 26.

¹³ Smith v. McConnell, 17 Ill. 135; Stone v. Wood, 16 Ill. 177; Phelps v. Funkhouser, 39 Ill. 401.

CHAPTER XXXV.

SPECIFIC PERFORMANCE BY THE PERSONAL REPRESENTATIVE OF CONTRACTS TO CONVEY REAL ESTATE.

§ 436. Statutory provisions. Proceedings.

437. The consideration must be fully paid or performed before proceedings are instituted.

437a. Contracts made by decedent may be performed by personal representative when directed by the court.

§ 436. Where a deceased person has entered into a contract, bond or memorandum in writing to make a deed or title to land in this state, for a valuable consideration, and has died, without having executed and delivered such deed, any court having chancery jurisdiction, in the county where the land or some part of it is situated, may make an order compelling the personal representative of the deceased person to execute and deliver a deed to the party having the equitable right to the same, or his heirs, according to the intent and meaning of the contract, etc.; and such deeds will be valid in law. (Stat. 1872, title Contracts, § 2.) The person entitled to the benefit of such order to convey, or his heirs, having first fully paid, discharged and fulfilled the consideration of the contract, etc., as to the premises sought to be conveyed to the petitioner, *or if he is entitled in equity to a conveyance*, must apply to the court by petition in writing, and set forth therein such written contract, etc., and describe the lands to be conveyed, and give reasonable notice of the time and place of such application, to the personal representative and heirs of the deceased. (Ib. § 3.) The personal representative or the heirs of any deceased person who has made such contract etc., may, when the consideration has been paid and fulfilled, *or a conveyance ought to be made*, petition to such court, and obtain an order to convey, upon giving notice to the party entitled to the deed, under the same condition as provided in this statute. (Ib. § 4.) Where minor heirs are interested in such proceeding, reasonable

notice of the application must be given to their guardian; but if they have no guardian the court must appoint a guardian ad litem for them. (Ib. § 5.) The court may continue the cause from term to term, to obtain necessary evidence; but no order to convey shall be made unless the court is satisfied that the same may be granted without injustice to any heir or creditor of the deceased, and is just and equitable. (Ib. § 6.) And a complete record of the petition and proceedings must be made, and the court is required to order payment of costs as shall appear right and equitable. (Ib. § 7. See Form of Petition and Order, Nos. 67, 68.)

This statute was copied from sections 31 to 36, inclusive, of the statute of 1845, title Conveyances, so far as it relates to personal representatives of deceased persons, except the words in italics.

§ 437. The case of *Burgher v. Potter*, 32 Ill. 66, arose out of the written contract of Potter, deceased, to convey land. His executors petitioned for an order to convey, while the purchase money was not wholly paid, and the court held, that sec. 34 (now § 3) did not authorize this proceeding on the part of the personal representative till the money was wholly paid, and that a court of equity alone could do complete justice between the parties in such cases. Possession of the premises could be obtained by the heirs by ejectment or forcible detainer, but, the court remarked, "this would not settle the equities of the parties, or put an end to the case." The minor heirs of the testator, suing by their next friend, joined in the petition with the executors, according to sec. 5 of the present Chancery Code, and the court approved of it.

The reasonable notice to defendants in these cases, and the time and manner of giving it, are the same as in chancery cases.

§ 437a. Section 127 further provides that, "All contracts made by the decedent may be performed by the executor or administrator, when so directed by the county court."

This provision was evidently intended to apply to contracts other than for the sale or purchase of land, since these are, as we have just seen, otherwise sufficiently provided for.

CHAPTER XXXV.

SALE OF REAL ESTATE BY EXECUTORS UNDER A POWER
CONTAINED IN A WILL, AND LEASES AND MORTGAGES
UNDER THE STATUTE, TO PAY DEBTS.

§ 438. Power to sell given in a will recognized by statute — Sales valid —
When part of the executors may make a valid sale.

439. In what case an executor has power to sell.

440. If will directs the sale, but no executor is named, or the executor
named refuses to serve, a decree of sale must be procured

441. What is a failure or refusal to qualify as executor.

442. Executors may mortgage or lease lands to pay debts.

443, 444. How such mortgages are to be foreclosed.

§ 438. The statute, title Administration, § 97, provides that, "In all cases, where power is given in any will to sell and dispose of any real estate, or interest therein, and the same is sold and disposed of in the manner and by the persons¹ appointed in such will, the sale shall be good and valid; and where one or more executors shall fail or refuse to qualify, or depart this life before such sales are made, the survivor or survivors shall have the same power and their sales shall be as good and valid as if they all joined in such sales."

§ 439. Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made, if the proceeds are distributable by the executor, the power of sale is in him by implication. Thus a power in a will to sell or mortgage, without naming a donee, will, unless a contrary intention appears, vest in the executor, if the fund is to be distributed by him, either for the payment of debts or legacies.²

¹ See *Pahlman v. Smith*, 25 Ill. 448.

² *Rankin v. Rankin*, 36 Ill. 293; *Wms. Ex'rs*, 413; *Bentham v. Wiltshire*, 4 Mad. 44; and see 2 Story Eq. § 1064; and 4 Kent. 326, n. e.; 3 Redf. Wills, § 18, pl. 4, and notes.

§ 440. Where the will directs the sale of real estate, but omits to name an executor, the administrator with the will annexed has no power to sell such real estate without the authority of a decree of court authorizing it.³ So where an executor is appointed by a will directing such sale, and he refuses to act, the administrator with the will annexed cannot sell the real estate without a decree directing it.⁴ This is a power not conferred by statute upon an administrator, but is special and personal in its character, implying confidence reposed by the testator in the judgment and discretion of the person invested with it, and it cannot be delegated. Much less then ought it to be exercised by one whom the testator never expected would administer on his estate, and whom, perhaps, he would not have chosen had the matter been presented to his mind.

§ 441. As to what is a "failure" to qualify as an executor within the meaning of the 97th section, this may be made to appear to the court by any kind of satisfactory evidence, as that of his removal from the state, his declarations to others of his intention not to serve.⁵ But a "refusal" cannot be predicated upon mere negative acts or omissions. The executor named should come before the court and refuse to qualify or file his refusal in writing with the court.⁶ The entry of record in the probate court of the failure or refusal of the executor to qualify would doubtless be conclusive in any collateral proceeding.⁷

³Hall v. Irwin, 2 Gilm. 176, Justices Young and Scates *dissenting*.

⁴Ib. Wells v. Cowper, 1 Ohio Cond. R. 278.

⁵Sharp v. Pratt, 15 Wend. 612; Roseboom v. Mosher, 2 Denio, 69; Den v. Sparks, Dev. & Batt. 389; Chanet v. Villeponteaux, 2 McCord, 27; Wardwell v. McDowell, 31 Ill. 364.

⁶See Clinefelter v. Ayres, 16 Ill. 329, and cases cited. Also, *ante*, § 217, and see *contra*, Giddy v. Butler, 3 Munf. 345.

⁷The cases of Wardwell v. Smith, 31 Ill. 364, and Ayres v. Clinefelter, 20 Ill. 465, were decided under a statute (1837) by which taking probate of wills and issuing of letters testamentary are expressly declared to be *ministerial acts*, and are not applicable to the present statute. See *ante*, § 172.

§ 442. Section 120 provides that, "Real estate may be mortgaged in fee or for a term of years, or leased by executors: *Provided*, that the term of such lease or the maturity of the indebtedness secured by such mortgage, shall not extend beyond the time when the heirs entitled to such estate shall attain the age of twenty-one years, if male, or eighteen years, if female: *And, provided also*, that before a mortgage or lease shall be made, the executor shall petition the county court for an order authorizing such mortgage or lease to be made, and which the court may grant, if the interests of the estate require it: *Provided, further*, that the executor making application as aforesaid, upon obtaining such order, shall enter into bond, with good security, faithfully to apply the moneys to be raised upon such mortgage or lease, to the payment of the debts of the testator; and all moneys so raised shall be assets in the hands of such executor for the payment of debts, and shall be subject to the order of the court in the same manner as other assets."

The petition under the foregoing section of the statute may follow the form of an *executor's* petition for the sale of real estate, except as to the prayer, which should be for an order to mortgage the real estate for the necessary sum, or lease it, as the case may require; and the order should give all necessary directions including a direction to report proceedings under it.

§ 443. Section 121 provides that, "Foreclosures of such mortgages shall only be made by petition to the county court of the county in which the premises, or a major part thereof, are situated; and any sale made by virtue of any order or decree of foreclosure, may, at any time before confirmation, be set aside by the court for inadequacy of price or other good cause, and shall not be binding upon the executor until confirmed by the court."

§ 444. Section 122 provides that "No decree of strict foreclosure shall be made upon any such mortgage, but redemption shall be allowed, as is provided by law in cases of sales under executions issued upon common law judgments."

CHAPTER XXXVII.

CREDITORS' LIEN ON LANDS OF THE DECEASED.

§ 445-448. Creditors have a lien on the lands of the decedent for their claims not paid out of personal estate. How long the lien continues.

§ 445. Creditors have a right, when the personal estate is insufficient to satisfy their claims against the deceased, to have lands belonging to the estate sold to raise a fund for that purpose. This right is in effect a lien upon such lands. The estate of the heir or devisee in the lands of the deceased is therefore defeasible and liable to be defeated by a sale made by the administrator, in due course of administration, but becomes absolute after the debts of the estate are extinguished. And a purchaser of such lands from the heir, in general, occupies no better position. This lien of the creditor is not, however, perpetual, but may be lost by gross laches or unreasonable delay.¹ There is no statute declaring how long such liens may continue. But in *McCoy v. Morrow*,² where the petition by the administrator for the sale of land was filed twenty-six years after the death of the intestate and the date of letters of administration, and in *Unknown Heirs of Langworthy v. Baker*,³ where letters of administration were granted over twenty years after the death of the intestate, and twenty-seven years after the debt became due, for the payment of which it was sought to sell lands, it was held, that a creditor will be considered as having waived his lien on the property of the intestate if he does not pursue his remedy in a reasonable time, and it would seem by analogy to the lien of judgments and the limitation for entry upon, and recovery of lands, that seven years from the death of the intestate should bar such liens.

¹ *Vansyckle v. Richardson*, 13 Ill. 171.

² 18 Ill. 519.

³ 23 Ill. 484.

§ 446. In the case of *Rosenthal v. Renick*,⁴ where nine years had elapsed after the death of the testator before filing the petition for the sale of lands, the county court refused an order of sale on the ground that the lien of the creditors had been lost by the lapse of seven years between the death of the testator and the filing of the petition. The supreme court reverse this decision and say, in substance, that if the real estate had been aliened by the devisee, for a valuable consideration, before the filing of the petition, or even if money had been expended by the devisee himself in improving such real estate, we should not hesitate to say, that the lapse of more than seven years between the death of the testator and the filing of the petition, would be a sufficient reason for denying the prayer of the petition. In many cases a shorter limitation might properly be applied, to protect innocent purchasers against this secret lien; and even where the title is still in the heirs, the period of seven years may be properly adopted in analogy to our statute of limitation relating to the lien of judgments, and under certain circumstances, to the action of ejectment, if the delay of the creditors in causing the application to be made is unexplained. The legislature not having thought proper to fix a definite and inflexible period of limitation, courts will not do so. And while it may be said, generally, that this secret lien is entitled to no special favor, and courts should be intolerant of laches, because the lien is secret, yet, in the absence of a legislative rule every case must depend largely upon its own circumstances. The delay in this case was satisfactorily explained and shown not to result from mere negligence, and the order for the sale was granted.

§ 447. In the case of *Moore v. Ellsworth*, 51 Ill. 308, where letters of administration were granted in September, 1860, and the petition was not presented until January, 1869, the court say: "It is insisted that an order of sale should not have been made after the lapse of seven years. But we held, in *Rosenthal v. Renick*, 44 Ill. 202, that no inflexible rule can be

⁴44 Ill. 202.

laid down. Each case must be judged upon its own merits, and all that can be said as a general rule is, that a delay of seven years, if unexplained, is a sufficient reason for refusing the order, but if the delay is satisfactorily explained, as by showing the settlement of the estate has been necessarily delayed, and the lands remain in the same condition as when the decedent died, the mere lapse of time is not a reason why the order of sale should not be made. In this case the record shows, that the largest claim against the estate is a judgment rendered in the circuit court, in June, 1868, and, as urged by counsel, until the termination of the litigation which resulted in this judgment, the administrator would be wholly uncertain to what extent it would be necessary to sell the real estate. In the meantime, so far as appears, the title has remained in the heirs. No equities have intervened, and as the indebtedness of the estate was only finally determined a few months before this application was made, we cannot say it was barred by lapse of time."

§ 448. In the case of *Burson v. Goodspeed, adm'r*, (before the supreme court of Illinois,) 4 Chicago Legal News, 242, over thirteen years had intervened between the death of the intestate and the filing of the petition, and the delay was satisfactorily explained, and the order granted, the court referring with approbation to the decisions in *McCoy v. Morrow*, *Rosenthal v. Renick*, and *Moore v. Ellsworth*, and saying that mere lapse of time is not a reason why the order should not be made.

§ 448a. As to other cases of liens of judgments and decrees, and the modes of enforcing them, see Statute, title Judgments and Decrees, §§ 1, 2, 39.

CHAPTER XXXVIII.

SALE OF REAL ESTATE BY ORDER OF COURT TO PAY DEBTS.

PART I. SALE TO PAY PURCHASE MONEY DUE ON LANDS.

§ 449. The court may coerce the personal representative to apply for an order to sell real estate to pay debts.

450. Personal representative may obtain an order of court to sell land to pay the purchase money due thereon. And may pay unpaid purchase money in some cases.

451. How to procure the order of sale.

§ 449. Section 130 provides that, "Whenever real estate is required to be sold for the payment of debts, the court may make all necessary orders to coerce the executor or administrator to make immediate application for an order to sell such real estate."

§ 450. Section 111 provides that, "In all cases where a decedent is seized of a legal or equitable title to real estate, the payment whereof has not been completed, and the estate of such decedent is unable to make complete payment therefor, with advantage to such estate, the administrator or executor may sell or dispose of such real estate upon the order of the county court, and the money arising from such sales shall be assets in the hands of such executor or administrator, as in other cases. But in all cases where the estate of such decedent shall be solvent, and such lands as aforesaid may be paid for without prejudice to the creditors, heirs and devisees of the estate, the executor or administrator shall complete the payment for the same out of the proceeds of the personal property, in the name of the heirs or legal representatives of the decedent entitled thereto; and he shall be allowed a credit for the amount of such payments, and all reasonable expenses incurred in making the same, upon final settlement of such estate: *Provided*, that the provisions of this

section shall, in nowise interfere with the provisions of any last will or testament."

§ 451. In order to procure an order to sell real estate under the statute just quoted, it would be advisable to proceed as in cases where an order of sale is obtained to sell lands for the payment of the ordinary debts of the estate.

CHAPTER XXXVIII

SALE OF REAL ESTATE TO PAY DEBTS.

PART II. SALE OF LANDS BY ORDER OF COURT TO PAY DEBTS GENERALLY.

- § 452. When, by an account filed, it is ascertained that the personal estate is insufficient to pay the debts, real estate may be sold.
- 453, 454. Mode of commencing proceedings is by petition—court—parties.
455. The court must have jurisdiction of the parties and the subject matter.
456. No person interested in the real estate is bound by the proceedings unless made a party as provided by statute.
- 457, 458. What the petition shall contain—must be sworn to.
- 459, 460. Docketing cause—practice as in chancery.
461. If court has jurisdiction of the subject matter and of the person, subsequent irregularities will not vitiate the order of sale.
462. Reversal of the order of sale—its effect on the title.
463. Of summons—when returnable.
464. Service of summons—how made.
465. What the summons must contain.
466. Of the return—its form—of the record as showing service—amendment of return.
467. General principles,
468. Notice by publication—affidavit of non-residence, etc.—notice—its contents—where and how published—notice to be mailed to defendant.
469. Of the nearest newspaper.

- § 470. Notice to be published four successive weeks, the first publication to be more than forty days before the term of court.
- 471. Printer's certificates of publication as evidence—proof may be made otherwise.
- 472. Date of newspaper deemed the day of its publication—computation of time.
- 473. Recitals in the order, as curing defects in the printer's certificate.
- 474. Of the form and substance of the notice.
- 475. Defective notice cured by defendant's appearance and defense.
- 476. Of guardians *ad litem*—in what cases appointed.
- 478. The duty of the court to appoint guardians *ad litem*—effect if none appointed.
- 479. Duty of guardians *ad litem*.
- 480. Infants cannot be defaulted—nor petition taken as confessed by them—essential facts must always be proved as against them—what the record should show.
- 481. Of the hearing—what the court shall find—order of sale.
- 482. Amendment of petition to make new parties—service of summons—republication of notice in certain cases.
- 483. It must be shown that there are existing debts—heirs and devisees may object to claims already allowed by the court.
- 484. The record of the probate court of another state—its competency as evidence.
- 485. Not necessary to show that personal estate of the deceased in another state has been exhausted.
- 486. No proof of the allegation of ownership of real estate necessary when the petition is taken as confessed.
- 487. The real estate cannot be sold except to pay debts due at the death of the decedent.
- 489. Recitals of what the court found—their effect.
- 490. How much real estate the order should direct to be sold.
- 491. The interest of the widow under a devise—she considered a creditor to the extent of her award.
- 492. The court may order the sale to be made on a credit, and may give special directions as to the notice of sale.
- 493. Of a supplemental petition.
- 494. Where other debts were presented and proved after the sale was made, a sale of the remaining property ordered to be sold in the first instance, held valid.
- 495. The court need not determine the particular estate which the decedent had in the land.
- 496. Of errors in the description of the real estate.
- 497. Of the sale—notice—character of notice—how long to be given—what it must contain—hour of sale—penalty for disregarding—security to be taken—report of sale to be made.

§ 498. Validity of sale.

499. Of the nearest newspaper.

500. Postponement of sale — no more than is necessary to be sold — to be sold in parcels.

501. Sales to be made by the personal representative — valid against heirs and devisees — if personal representative dies before conveyance made, the administrator *de bonis non* may convey.

502. What the deed must recite. Effect of covenants of warranty.

503. What title the purchaser acquires.

504. Widow's right of dower and homestead, as affecting title.

505. Agreement between parties not to bid against each other at the sale vitiates title.

506. Personal representative not to bid at his own sale, directly or indirectly. It is fraud *per se*.

507. Jurisdiction to set aside such a sale.

508. Limitation in these cases.

509. Purchase in these cases not void, but voidable. Proceedings in equity.

510. Of the account of interest, taxes, etc.

511. Statutory provision — proceeds of sale to be applied in payment of debts.

§ 452. The statute, section 98, provides that, "When the executor or administrator has made a just and true account of the personal estate and debts to the county court, and it is ascertained that the personal estate of a decedent is insufficient to pay the just claims against his estate, and there is real estate to which such decedent had claim or title, such real estate, or such portion as may be necessary to satisfy the indebtedness of such decedent, and the expenses of administration, may be sold in the manner herein provided."

Section 100 of the statute (post, § 457), sets forth more distinctly what the account should contain. (See Form No. 69.)

§ 453. Section 99 provides that, the mode of commencing the proceedings for the sale of real estate in such cases shall be by filing of a petition by the executor or administrator, in the county court of the county where letters testamentary or of administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservators of such as have conservators, and the actual occupants of the premises, where the same or any

part thereof are occupied, shall be made parties defendants. And if there are persons interested in the premises whose names are not known, they shall be made parties by the name of unknown owners." (See Form of Petition, No. 70.)

§ 454. The statute clearly prescribes the steps to be taken in order to obtain authority to sell real estate, and each of these must be carefully taken as directed. It is sufficiently explicit as to the filing of the petition, and the court in which it is to be filed: so also as to the parties to be made defendants. The consequences of a mistake here are of great importance, and especially to the purchaser of such real estate. The general principle of the law is strictly applicable to this class of cases; that, where special proceedings are authorized by which the estate of one may be divested and transferred to another, every material step in the course of the proceedings must be pursued.¹

§ 455. In all judicial proceedings, in order to render the judgment or decree binding upon the parties, the court must be invested with jurisdiction. If the parties are not before the court, there can be no power to bind them by decree or otherwise. A defendant must have notice of the pendency of the proceeding, and a reasonable opportunity to be heard in defense of his rights, before these can be affected by the judgment or decree. The court must, likewise, have jurisdiction of the subject of litigation, or the power to adjudicate and determine the question in dispute will be wanting. If the court lacks such jurisdiction, its proceedings will be void, and binding upon no person; and they may be questioned in any proceeding, whether direct or collateral.²

§ 456. No person having an interest in the real estate will be bound by an order of sale unless he is made a party to the petition, in the manner pointed out in the statute. Thus, the interest of a posthumous child in real estate cannot be divested by an order of sale in a proceeding to which he was not made.

¹ See *Reynolds v. Wilson*, 15 Ill. 384. The petition must be filed as required by law. *Monahan v. Vandyke*, 27 Ill. 154.

² *Walker, C. J., in Morris v. Hogle*, 37 Ill. 150.

a party.³ He inherits directly from the parent, with the same effect as if he had been born before the decease of the parent.⁴

§ 457. Section 100 provides that, "The petition shall set forth the facts and circumstances on which the petition is founded, in which shall be stated the amount of claims allowed, with an estimate of the amount of just claims to be presented, and it shall also contain the amount of personal estate which has come to his hands, and the manner in which he has disposed of the same, with a statement of the amount of claims paid. The petition shall be signed by the executor or administrator, and verified by his affidavit, and shall be filed at least ten days before the commencement of the term of court at which the application shall be made." (See Form No. 70.)

§ 458. The petition must contain all the jurisdictional facts,⁵ and it will be sufficient if it contains all that the statute requires.⁶ But it need not pursue the exact language of the statute. Any words which necessarily convey to the mind all that the statute requires, will be sufficient; and the language used should be construed liberally and favorably to sustain the jurisdiction of the court and the validity of an order of sale.⁷ The petition must set forth that there are existing debts against the estate which the administrators will be called upon to pay.⁸ But debts created by the administrator after the death will not justify a proceeding to sell land.⁹ The present statute does not in terms require the petition to show that an account has been made and returned to the court; but it authorizes the adminis-

³ *Detrick v. Migatt*, 19 Ill. 146; *Smith v. McKee*, 39 Ill. 279.

⁴ *McConnell v. Smith*, 23 Ill. 611; *Bottsford v. O'Connor*, 52 Ill. 316.

⁵ *Dorman v. Tost*, 13 Ill. 127; *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484.

⁶ *Stow v. Kimball*, 28 Ill. 93; *McNitt v. Turner*, U. S. Sup. Ct. 5 Leg. News 349. When the petition states enough to require the court to act, its orders and decisions are binding until they are reversed by direct proceedings for that purpose, as by appeal or on error; they cannot be attacked collaterally. *Iverson v. Loberg*, 26 Ill. 179.

⁷ This was said in a collateral action. *Standemire v. Standemire*, Sup. Ct. Ala. 1872, cited 4 Leg. News, 133.

⁸ *Dorman v. Tost*, *supra*. See post, §§ 483, 484.

⁹ *Fitzgerald v. Glancy*, 49 Ill. 465. See post, § 487.

trator to file a petition when he ascertains that the personal estate is not sufficient to pay the debts, and shall have filed such an account. It is necessary to allege that the account has been made or that, as in the case before the court, there were no personal effects of which an account could be made. It suffices to give the court jurisdiction, to allege that the intestate died leaving no personal estate, but this allegation should be proved before the court should order the sale of land.¹⁰ And in such case it is not essential to show that an appraisement bill was filed by the personal representative.¹¹

§ 459. Section 101 provides that, "Such application shall be docketed as other causes, and the petition may be amended, heard, or continued for notice, or for other cause. The practice in such cases shall be the same as in cases in chancery."

§ 460. This is a statutory and not a chancery proceeding,¹² but the statute provides for written pleadings, and requires the filing of an answer, and replication so as to form issues, as in chancery causes; and upon appeal to the circuit court, the case must be tried upon the issues so presented.¹³ And where the petition alleges the ownership of the lands to be in the intestate at the time of his death, and is taken as confessed, no proof of the ownership is necessary for the purpose of this proceeding.¹⁴

§ 461. When jurisdiction has once attached to the subject matter and the person, whatever errors may subsequently occur in its exercise, the proceeding being before the court, cannot be impeached collaterally, except for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.¹⁵ The purchaser under it is not bound to look

¹⁰ *Bree v. Bree*, 51 Ill. 357.

¹¹ *Shoemate v. Lockridge*, 53 Ill. 503.

¹² *Moline W. P. Co. v. Webster*, 26 Ill. 233; 22 Ill. 449; 51 Ill. 390,

¹³ *Burson v. Goodspeed*, 4 Leg. News, 242.

¹⁴ *Bowles' Heirs v. Rouse*, 3 Gilm. 409.

¹⁵ *McNitt v. Turner*, (U. S. Sup. Ct.) 5 Leg. News, 349; *Stow v. Kimball*, 28 Ill. 93; *Goudy v. Hall*, 36 Ill. 313. As to a bill to set aside a sale for fraud and other irregularities, see *Lloyd v. Malone*, 23 Ill. 43.

beyond the order. If there is error in it of the most palpable kind, if the court which rendered it had, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error.¹⁶

§ 462. The reversal of the order of sale on appeal or for error, except when the court making the order had no jurisdiction of the subject matter or of the person does not destroy the title acquired by the sale.¹⁷

§ 463. Section 102 provides that, "Upon the filing of the petition, the clerk of the court where the same may be filed shall issue a summons, directed to the sheriff of the county in which the defendant resides, if the defendant is a resident of this state, requiring him to appear and answer the petition on the return day of the summons; and where there are several defendants, residing in different counties, a separate summons shall be issued to each county, including all the defendants residing therein. Every summons shall be made returnable to the first term of the county court after the date thereof, unless the petition is filed within ten days immediately preceding any term, in which case the summons shall be returnable to the next term thereafter."

§ 464. In proceedings of this character, a summons that distinctly informs the parties summoned of the object of the proceeding is sufficient, notwithstanding the defendants are, in the body of the writ, called upon to answer a "bill in chancery."¹⁸

§ 465. Section 103 provides that, "The service of summons shall be made by reading thereof to the defendant, or leaving a copy thereof at the usual place of abode, with some member of the family of the age of ten years and upwards, and informing

¹⁶ Grignon's Lessee v. Astor, 2 How. U. S. p. 341.

¹⁷ Goudy v. Hall, 36 Ill. 313. Ib. 30 Ill. 109.

¹⁸ Jeffries v. Decker, 42 Ill. 519.

such person of the contents thereof; which service shall be at least ten days before the return of such summons." (See Form of Return, No. 71.)

§ 466. The general principle is, where the statute prescribes no particular mode of serving a summons, it may be done by reading to the defendant; but if the statute directs the manner of making service, no other can be substituted. In *Bottsford v. O'Connor*, 52 Ill. 316, the court held that the return — "Served this writ on the within named Mary O'Connor and Charles O'Connor, the others not found in my county," is insufficient. It must show the time when, upon whom, and the manner in which service was made. And the court further held, that if the return shows service which is insufficient, and the record fails to show that the court found it had jurisdiction, then the presumption is rebutted in collateral actions, and it must be held that the court acted upon insufficient service; the general principle being that, when a service and return appear in the record, and there is no finding of the court from which it may be inferred that there was other service or appearance, it will be presumed that the court acted upon the service which appears in the record. And where service is had on part only of the heirs, the order will bind those, but not such as were not served.¹⁹

The sheriff's return on the writ may be amended so as to set forth the facts, in these cases as in any others, upon motion, before the order of sale is made.

§ 467. The general principle which requires the defendants in a suit to be notified of its pendency, applies to proceedings of this kind, as to all other suits. If, therefore, notice is not served or given to the heirs in some mode known to the law, an order of sale to pay debts will be void, as to all parties who are not so notified, and the purchasers at the sale will not be protected in their title.²⁰

¹⁹ See *Pardon v. Dwire*, 23 Ill. 572; *Fitzgerrald v. Davlin*, Sup. Ct. Ill 4 Leg. News, 271.

²⁰ *Morris v. Hogle*, 37 Ill. 150.

§ 468. Section 104 provides that "Whenever any petitioner or his attorney shall file in the office of the clerk of the court in which his petition is pending, an affidavit showing that any defendant resides or hath gone out of this state, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known; or that, upon diligent inquiry, his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in his county, and if there is no newspaper published in his county, then in the nearest newspaper published in this state, containing notice of the filing of the petition, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case, and a description of the premises described in the petition; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence." (See Form of Affidavit and of Notice, Nos. 72, 73.)

§ 469. By the nearest newspaper, is undoubtedly meant the newspaper nearest the village or city in which the court is held; and courts will not be very precise in measuring the distance.²¹

§ 470. Section 105 provides that, "The notice required in the preceding section may be given at any time after the filing of the petition, and shall be published at least once in each week for four successive weeks, and no default or proceeding shall be taken against any defendant not served with summons, and not appearing, unless forty days shall intervene between the first publication, as aforesaid, and the first day of the term at which such default or proceeding is proposed to be taken."

§ 471. The statute, title Advertisements, § 1, makes the printer's or publisher's certificate, annexed to a copy of a legal notice, stating the number of times such notice has been pub-

²¹ See *Stow v. Kimball*, 28 Ill. 93.

lished and the dates of the first and last papers containing the same, prima facie evidence of those facts; but does not exclude other proof thereof. (See Form of Printer's Certificate, No. 74.)

§ 472. Where the printer's certificate of publication of the notice is defective in not showing the first and last days of publication, it is cured by a recital in the decree, that "it appearing to the court that notice according to law was given of the pendency of this cause." The presumption from such a recital is, that the court received other evidence than the certificate of the dates of publication.²²

§ 473. The date of a newspaper is deemed the day of its publication, although it may have been actually published on a previous day. Under the last section, forty days must intervene between the day of the date of the newspaper containing the first publication, and the first day of the term at which proceedings are proposed to be taken; and in making the computation, both of those days are to be excluded.

§ 474. It must be constantly borne in mind that, unless the mode pointed out by the statute for bringing the parties interested before the court is pursued, there will be such a want of jurisdiction as will vitiate the order of sale.²³ No form of notice is given by the statute. It is sufficient if it states all that the statute directs. It is not necessary that the name of the state, or the county, or the title of the court in which the petition is filed, or the term at which the cause is to be heard, shall appear in the introductory part of the notice. It is sufficient if the newspaper is published in the county where the cause is pending, if the body of the notice shows that the petition is filed, for instance, in the "Shelby County Court," and that the proceedings are to be held at the "court-house in Shelbyville;" and it is not necessary that the name of the state appear anywhere in the notice.²⁴ In *Gibson v. Roll*, 27 Ill. 88, the advertisement was published in a newspaper pub-

²² *Moore v. Neil*, 39 Ill. 256; *Goudy v. Hall*, 30 Ill. 109.

²³ *Herdman v. Short*, 18 Ill. 59; *Morris v. Hogle*, 37 Ill. 150; *Fitzgerald v. Davlin*, 4 Leg. News, 271. See ante, §§ 454, 555.

²⁴ *Moore v. Neil*, 39 Ill. 256; *Goudy v. Hall*, 36 Ill. 313.

lished in Tazewell county, and the notice did not state the name of the county-seat, but only that the cause would be heard in the "county court of Tazewell county, on etc." This notice was held sufficient. And it is sufficient if the notice states that the court is to be held "on the third Monday in May *next*." It will be presumed to be in May next succeeding the date of the paper.²⁵

§ 475. When the party to be notified appears, and defends, this will cure any defect in the form of the notice or time or manner of its publication.²⁶

§ 476. Section 106 provides that, "When it appears that any of the persons required to be made parties defendant, who have been served with summons or notified as aforesaid, are minors under the age of twenty-one years, if males, or eighteen years, if females,"²⁷ without a guardian resident in this state, or are persons having conservators, or where such guardian, if any, or conservator shall not be personally served with summons, or shall not appear, the court shall appoint a guardian *ad litem*, who shall appear and defend in behalf of such minors, and be allowed such compensation as may be fixed by the court." (For form of order making the appointment, see Order of Sale, No. 76. See Form No. 75, Guardian's Answer.)

²⁵ Ibid. Finch v. Sink, 46 Ill. 169. In the last case, the notice set forth that the application would be made "at the December Term," and bore date Sept. 6, 1852. — Presumed that the application would be made at the December Term, 1852.

²⁶ See Bowles's Admr. v. Rouse, 3 Gilm. 409.

The following cases were decided under former and different statutes and are not in every respect authorities under the present statute. Turney v. Turney, 24 Ill. 625; Gibson v. Roll, 27 Ill. 88; Monahan v. Vandyke, 27 Ill. 155; Moore v. Neil, 39 Ill. 256; Goudy v. Hall, 36 Ill. 313; Cromine v. Tharp, 42 Ill. 120; Stow v. Kimball, 28 Ill. 93; Morris v. Hogle, 37 Ill. 150; Schnell v. City of Chicago, 38 Ill. 382. They will be found of value in suits involving title to lands sold by administrators during the existence of those statutes.

²⁷ The case of Burson v. Goodspeed, 4 Leg. News, 242, arose under the act of 1857, the court holding that no guardian *ad litem* was necessary for a female between eighteen and twenty-one years of age; though the words "if males, or eighteen years, if females," were not contained in that act.

§ 478. The statute requires a guardian *ad litem* to be appointed in specified cases, for minors and for persons having conservators, and unless this is done, the order to sell will be reversed on error.²⁸ And the court should make the appointment, notwithstanding the same is not prayed for in the petition, or any motion made therefor.²⁹

§ 479. The rule is inflexible that the guardian *ad litem* must defend the interests of the infants as vigorously as the nature of the case will admit; and it is his special duty to submit to the court every question involving the rights of the infants affected by the suit.³⁰

§ 480. A default cannot be taken against infants; and it is error for the court to take the petition as confessed as to them, under any circumstances.³¹ A guardian *ad litem* should be appointed for them before any steps are taken, wherein they are entitled to be heard.³² It is the duty of the court to compel him to answer, before the order is granted, and the petitioner must make full proof of his right to the relief claimed. And where the answer admits the allegations of the petition to be true, the petitioner must prove their truth with the same strictness as if the answer had interposed a direct and positive denial.³³ In *Fridley v. Murphy*,³⁴ Caton, C. J., said, "Independ-

²⁸ *Herdman v. Short*, 18 Ill. 59. The mere reversal of an order under which an administrator has sold land, does not divest third persons of title. If the court has jurisdiction over the *parties* and the *subject-matter*, acts performed and rights acquired by third persons under its judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal. *Goudy v. Hall*, 36 Ill. 313; *Ibid*, 30 Ill. 109. Infant heirs seeking a reversal of the order by proceedings in error, must sue out the writ by their guardian or next friend. *Napper v. Short*, 17 Ill. 119.

²⁹ *Rhoads v. Rhoads*, 43 Ill. 239.

³⁰ *Rhoads v. Rhoads*, *supra*; *Sconce v. Whitney*, 12 Ill. 150; *Enos v. Capps*, *ib.* 255.

³¹ *Sconce v. Whitney*; *Enos v. Capps*, *supra*; *McClay v. Norris*, 4 Gilm. 370; *Chaffin v. Kimball's Heirs*, 23 Ill. 36.

³² *Cost v. Rose*, 17 Ill. 276.

³³ *Enos v. Capps*, 12 Ill. 255; *Hitt v. Ormsbee*, *ib.* 166; *Hamilton v. Gilman*, *ib.* 260; 16 Ill. 354; 27 Ill. 145. *Rhoads v. Rhoads*, 43 Ill. 239. See post, § 483.

³⁴ 25 Ill. 146.

ently of the answer, the court should have been satisfied by proof that the facts actually existed which would require a sale of the land. We will not say that such proof must have been set forth at large upon the face of the record, so that this court could see that they were sufficient; but the record should show that the court did hear proof which satisfied it of the truth of the allegations of the petition."

§ 481. Section 107 provides that, "Upon hearing the cause upon the issues formed or taken, the court shall hear and examine the allegations and proofs of the parties and of all other persons interested in the estate who may appear and become parties; and if, upon due examination the court shall find that the executor or administrator, has made a just and true account of the condition of the estate, and that the personal estate of the decedent is not sufficient to pay the debts against such estate, the court shall ascertain, as nearly as can be, the amount of deficiency, and how much of the real estate described in the petition it is necessary to sell to pay such deficiency, with the expenses of administration then due or to accrue, and make a decree for the sale thereof: *Provided*, that where any houses and lots, or other real estate are so situated that a part thereof cannot be sold without manifest prejudice to the heirs, devisees or owner, the court may order the sale of the whole or such part as it may deem best; and the overplus arising from such sale shall be distributed among the heirs and devisees, owners, or such other persons as may be entitled thereto." (See Form of Order to Sell, No. 76.)

§ 482. Where it appears at any stage of the proceedings that there are any persons interested in the real estate, as the widow, heirs, devisees of the testator, or intestate, guardians or conservators of such, or the actual occupants of the premises, who are not already made defendants, the court should require the petition to be amended so as to make them parties; and they should be brought into court by service of process on them, or by publication of notice, or they may enter their appearance, where that is proper; as if they had been made

parties to the original petition.³⁵ And where the petition has been amended so as to embrace real estate other than that described in the original petition, and parties have been brought in by publication, further notice to them by publication would be necessary.

§ 483. An order for the sale of real estate of a decedent will not be made, unless it is shown to the court that there are existing debts against the estate. There must be a judicial inquiry as to the existence of debts.³⁶ And the allowance of a claim by the probate court against an estate is not conclusive against an heir, nor for an equal reason, against a devisee, or the grantee of either of them, in this proceeding, and he may contest its validity.³⁷ The rule is, that whatever defense an administrator may be allowed to make against the claims or demands of creditors, may be made by any person interested in the realty, against an application of this nature.³⁸

§ 484. The record of the probate court of another state, showing that the administrator there reported claims existing against the estate, but which were not there probated, is not such evidence of indebtedness as will entitle an administrator to an order of sale. These claims should have been presented to the administrator in this state, or filed with the clerk of the probate court (under the present law a copy should be filed with the clerk), and been probated.³⁹

§ 485. It is not necessary to show before granting an order of sale that the personal estate of the decedent in another state has been exhausted.⁴⁰

§ 486. When the petition alleges the ownership of the real

³⁵ See *Bowles' Heirs v. Rouse*, 3 Gilm. 409.

³⁶ *Dorman v. Tost*, 13 Ill. 127; *Rozier v. Fagan*, 46 Ill. 404.

³⁷ *Moline W. P. Co. v. Webster*, 26 Ill. 233; *Stone v. Wood*, 16 Ill. 177; *Hopkins v. McCann*, 19 Ill. 113. See *People v. Lott*, 36 Ill. 447, as to presumptions from lapse of time in favor of a judgment.

³⁸ *Dorman v. Lane*, 1 Gilm. 143; Stat. Admin. § 60.

³⁹ *Hobson v. Payne*, 45 Ill. 158, on error from the county court.

⁴⁰ *Rosenthal v. Renick*, 44 Ill. 202.

estate to be in the intestate at the time of his death, and is taken as confessed, no proof of the ownership is necessary.⁴¹

§ 487. Where there were no debts owing by the decedent, and the petition showed that there was no personal property belonging to the estate; but the administrator had paid an attorney \$15 for services rendered to him, a printer \$5 for publishing notice, and the county clerk \$4.95 for fees, which the county court allowed as claims against the estate, and granted an order of sale; it was held on error, that the order of sale was *void*; the court observing, that the real estate of decedents should not be sold in this mode, except to pay debts due at the death of the decedent, as was held in *Dorman v. Tost*, 13 Ill. 27. Where there are no debts at the time letters of administration are granted, and no questions of distribution requiring the intervention of an administrator, the expenses of administering—the result of unnecessary interference—cannot be regarded as such a debt as would justify a proceeding to sell the lands. Such costs and expenses are not due from the deceased, and only arise from the unnecessary intermeddling of the administrator.⁴²

§ 489. The order may find that the material allegations of the petition were proved to the satisfaction of the court, and, in the absence of anything in the record rebutting such finding, it will be presumed that the order was warranted by the evidence; and the evidence need not be preserved in the record.⁴³

§ 490. It is error for the court to order the personal representative to sell so much of the real estate as he may deem for the best interests of the estate. He should be directed to sell as much as may be required to pay the debts of the estate.⁴⁴

§ 491. In *Deltzer v. Scheuster*, 38 Ill. 301, the court held that, while the widow is to be considered a creditor of the estate to the extent of her separate allowance, and entitled to have the real estate sold for its payment, yet if the will of the

⁴¹ Bowles' Heirs v. Rouse, 3 Gilm. 409.

⁴² Fitzgerald v. Glancy, 49 Ill. 465.

⁴³ Bree v. Bree, 51 Ill. 357; Shoemate v. Lockridge, 53 Ill. 503.

⁴⁴ Morris v. Hogle, 37 Ill. 150.

husband devised separate parcels of the real estate to her and to his children, the fund for the payment of her allowance should not be raised exclusively from the estate devised to the children, but should be apportioned between that and the estate devised to her, according to their respective values. And in apportioning the burden between the widow and children, the homestead being in the occupancy of the widow, but devised to the children, should not be taken into the account or ordered to be sold.

§ 492. The court may, if deemed beneficial to the estate, order the sale upon a credit; and it is advisable that the order should specify whether the sale shall be for cash, or on credit, and what credit.⁴⁵ And it is competent for the court to prescribe the mode and terms of the sale, provided it requires as much of the administrator as the statute contemplates and is not inconsistent with the statutory provisions. The court may require him to give a longer notice than the statute does, or that more copies of it be posted, or that it be published in more than one newspaper, etc. Requirements of this character are not prohibited by the statute, nor are they inconsistent with its policy. But they must be strictly followed or the sale will not be confirmed upon the filing of the report thereof.⁴⁶

§ 493. Where an order of sale was entered and sufficient property was sold to satisfy the claims then known to exist, and a report of the sale was made and approved, but at a subsequent term a supplemental petition was filed, showing that another claim had been allowed against the estate, and praying for another order to sell other real estate to pay the same: *Held*, that the original proceeding terminated when the report of the sale had been approved, and the court had no power or jurisdiction to make an order of sale upon the supplemental petition, without a new notice to the defendants.⁴⁷ This was de-

⁴⁵ *Moline W. P. M. Co. v. Webster*, 26 Ill. 233.

⁴⁶ *Reynolds v. Wilson*, 15 Ill. 394. It would not be improper to direct that the conveyance be withheld until the report of sale is made and confirmed. This would give the parties interested a chance to be heard.

⁴⁷ *Cromine v. Tharp*, 42 Ill. 120.

cided on a writ of error obtained by one of the heirs, and the case did not raise any question directly upon the title conveyed under the order.

§ 494. In *Stow v. Kimball*, 28 Ill. 93, where the order directed the administrator to sell all the real estate mentioned in the petition, and only a part of the same, but sufficient to pay all the debts then known to the petitioner, was sold and the report of the sale was approved, after which other valid claims were presented against the estate and allowed, making another sale necessary, the court held that no further order was required for that purpose. The original one was sufficient authority.⁴⁸

§ 495. It is not necessary for the court to determine, and specify in the order of sale, the particular estate which the decedent had in the land.⁴⁹

§ 496. Where the petition, order of sale and deed described the wrong tract of land, but the administrator intended to obtain the order to sell, and to sell and convey, another tract which belonged to the deceased, equity will not interpose to cancel, or to reform the conveyance, and make it according to the intention of the petitioner.⁵⁰ And where the petition described the land correctly as being lots 45, 46, 48 and 49 in section 33, and an abstract attached to the petition described it as being in section 23, and the inventory filed by the administrator from which the abstract was taken also described it as being in section 23, and the order of sale directed that the land in the petition be sold, namely, lots 45, 46, 48 and 49 in section 23, and the notice of sale and the administrator's deed correctly described the land, the court in a collateral action held, the misdescription in the inventory and order of sale to be mere clerical errors and did not affect the validity of the sale.⁵¹

⁴⁸ In *Monahan v. Vandyke*, 27 Ill. 154, no petition appeared among the files, nor did the order of sale mention any petition, and for these reasons the order was reversed on error.

⁴⁹ *Bowles' Heirs v. Rouse*, 3 Gilm. 409.

⁵⁰ *Ward v. Brewer*, 19 Ill. 291.

⁵¹ *Schnell v. City of Chicago*, 38 Ill. 382.

§ 497. Section 109 provides that, "No lands or tenements shall be sold by virtue of any such order of the county court, unless such sale is at public vendue, and between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the same day; nor unless the time and place of holding such sale were previously published for the space of four weeks, by putting up notices thereof in at least four of the most public places in the county where such real estate shall be sold, and also by causing a similar notice thereof to be published four successive weeks prior to the sale, in the nearest newspaper in this state; nor unless the real estate shall be described with common certainty in such notices."⁵² And if any executor or administrator, so ordered to make sale of any real estate, shall sell the same contrary to the provisions of this act, he shall forfeit and pay the sum of five hundred dollars, to be recovered by action of debt, in the name of the people of the state of Illinois, for the use of any person interested, who may prosecute for the same: *Provided*, that no such offense shall be deemed to affect the validity of such sale: *And, provided further*, that such executor or administrator may sell the same on a credit of not less than six nor more than twelve months, by taking note, with good personal security and a mortgage or sale mortgage on the premises for the payment of the purchase money. And after sale is made and the lands conveyed by the executor or administrator under the provisions of this act, the executor or administrator shall, at the first term of court thereafter, file in the office of the county clerk a complete report of said sale, giving a description of the premises sold, and in general a statement of the manner in which the terms of the decree were executed."⁵³ (See Form of Report, No. 81, and Order Approving the Sale, No. 82.)

⁵² Form of Notice of Sale, No. 80.

⁵³ Under the former statute no report of sale was necessary. See *Moore v. Neil*, 39 Ill. 256; *Stow v. Kimball*, 28 Ill. 93. And under the present statute it is conceived that the title would not be affected, unless the decree ordered the conveyance withheld till the report was made and approved by the court.

§ 498. Where there is a valid order, the intention of the statute is to hold the sale valid. Sec. 109, of the statute, supersedes the necessity of inquiring whether the administrator followed strictly the directions of the statute in making the sale. Nor does public policy require that a purchaser at one of these sales should examine into the fact of indebtedness, so as to ascertain if the sale is justified.⁵⁴

§ 499. The requirement that the notice of sale shall be published in the "nearest newspaper in the state," is rather indefinite, but it would seem to be answered by publishing it in the newspaper printed nearest to the real estate to be sold. This view is confirmed by the provision of sec. 98, requiring the petition to be filed in the county court of the county where letters were granted, notwithstanding the land is situated elsewhere. It could hardly be intended that the notice should be published at the place where the court was held, when the lands were situated, as they might be in this state, two or three hundred miles distant. The object of the publication is to give notice to persons residing in the vicinity of the land.⁵⁵

§ 500. An administrator need not sell real estate at a sacrifice, but may postpone the sale and advertise again.⁵⁶ He has no right to sell any more than is necessary to pay the debts and costs of administration, if the land is susceptible of division. If not susceptible of division and sale, without manifest prejudice to the heirs, devisees or owner, the court has power (Stat. § 107) to order the sale of the whole, or such part as it may deem best, and such an order should be obtained. Two or more tracts should not in general be sold together.⁵⁷

§ 501. Section 108 provides that, "All such sales of real estate shall be made and conveyances executed for the same, by the executor or administrator applying for such order, and shall be valid and effectual against the heirs and devisees of

⁵⁴ *Stow v. Kimball*, *supra*.

⁵⁵ In *Stow v. Kimball*, 28, Ill. 93, the supreme court was not disposed to be very exact in measuring distances in these cases.

⁵⁶ See *McDonald v. Nielson*, 2 Cowen, 139.

⁵⁷ See *Schnell v. City of Chicago*, 38 Ill. 382; *Day v. Graham*, 1 Gilm. 435; *Day v. Graham*, 4 Gilm. 389.

such decedent, and all other persons claiming by, through or under him or them. In case of the death of the executor or administrator applying for an order of sale before conveyance is made, the administrator *de bonis non* shall proceed in the premises and make conveyance in the same manner as if he had originally applied for such order, which conveyance shall be good and valid." (See Form of Deed, No. 83.)

§ 502. Administrator's deeds need not, under the act of 1872, title Conveyances, § 12, contain a copy of the order of sale,⁵⁸ but it is sufficient to refer to the same by the title of the cause, the name of the court, and the date of the term of court at which the order was obtained. And they should not in the conveyance clause contain the statutory words importing covenants of warranty, namely, "grant," "bargain," "sell," or either of them, or any clause of equivalent import; for though the personal representative cannot by covenant of title bind the estate, he may unintentionally make himself responsible on the covenants; as, in the case of *Sumner v. Williams*, 8 Mass. 162, where, though the administrators covenanted "*in their said capacity as administrators*" that they, "as administrators are lawfully seized, etc." In an action against them upon the covenant of warranty they were held to be answerable personally thereon.⁵⁹ However, a covenant by the personal representative in a conveyance of the decedent's land, in his capacity of administrator, "and not otherwise" is not binding on him personally.*

§ 503. A purchaser of land at an administrators' sale acquires only such title as was then vested in the heirs of the decedent. Therefore, if the land is subject to the lien of a judgment or a mortgage against the decedent or his grantor, the purchaser will take the title with that infirmity. The doctrine

⁵⁸ This was required by § 105 of the former statute of wills. A court of equity will compel an administrator to amend a deed made under this statute, by inserting the recital required by the statute. *Thorp v. McCullum*, 1 Gilm. 614.

⁵⁹ *Vincent v. Morrison*, (Beecher's) Breeze, 227; *Thayer v. Wendell*, 1 Gallison, 37.

* *Thayer v. Wendell*, *supra*.

of *caveat emptor* applies to such sales, and the purchaser will be presumed to have examined the records in relation to the title, and, if he neglects to do so, he must abide the consequences of the omission.⁶⁰ (As to the protection which the order of sale affords the purchaser, see ante, § 460.)

§ 504. The right of the widow and children to the homestead, and the widow's right to dower, are paramount to the rights of creditors; and while the purchaser at the administrator's sale may hold the fee as against the heirs, unless the sale is impeached for fraud, and the purchase money at the sale by the administrator is paid, yet he is not entitled to the possession as against the right of dower and homestead.⁶¹

§ 505. An agreement between parties not to bid against each other at a public sale, will vitiate the title in equity and at law, so that a deed executed in consequence of it would convey no title.⁶²

§ 506. As a general rule, a person acting in a fiduciary capacity, as an administrator, cannot be permitted to purchase property at his own sale. It is fraudulent *per se*. And it matters not that no fraud was proved, nor that the sale was at public auction, for a fair price, and made through the medium of a third party as the bidder, and to whom the administrator conveys.⁶³ The fact that the person interested by law to make the sale becomes the purchaser, whether by direct or indirect means, creates such a presumption of fraud as requires the sale to be vacated, if application is made in a reasonable time.⁶⁴

§ 507. Where no actual fraud appears in the sale to the administrator, the proceeding to set aside the sale must be had in a court of equity,⁶⁵ and this too whether a loss has resulted to

⁶⁰ *Walden v. Gridley*, 36 Ill. 523; *McConnell v. Smith*, 39 Ill. 279.

⁶¹ *Thornton, J.*, in *McClurken v. McClurken*, Ill. Supt. Ct. 4 Leg. News, 477.

⁶² *Loyd v. Malone*, 23 Ill. 43, and authorities cited.

⁶³ *Miles v. Wheeler*, 43 Ill. 123; *McConnell v. Gibson*, 12 Ill. 128; *Thorp v. McCullum*, 1 Gilm. 627; 1 Story's Eq. § 323.

⁶⁴ *Penonnean v. Blakeley*, 14 Ill. 15; *Wickliff v. Robinson*, 18 Ill. 145; *Robbins v. Butler*, 24 Ill. 387; *Dennis v. McCagg*, 32 Ill. 429.

⁶⁵ *Lockwood v. Mills*, 39 Ill. 602.

the owner or not."⁶⁶ But at law a different rule prevails. There it must not only appear that the person occupying a fiduciary relation, and in whom the law has reposed a trust, has become the purchaser, but that the sale was accompanied by fraud, to render the sale invalid.⁶⁷

§ 508. There is no definite time fixed by law within which proceedings must be begun to set aside a sale for fraud. Courts have never sought to lay down a precise rule. Each case is to be adjudged in this respect upon its own particular circumstances. This matter was discussed at some length in *Miles v. Wheeler*, 43 Ill. 123, to which, with the authorities there cited, reference is made. It is sufficient here to say that in some cases even fifty years have elapsed before suit begun.

§ 509. The purchase is not void, but only voidable. There is a disability in the party to hold, when objected to and questioned by those having an interest. They may have the sale set aside and a re-sale ordered, if deemed for their advantage. And in doing so, courts may and frequently do, order the premises put up for sale at the amount of the purchase, and if no advance upon that sum is bid, hold the trustee to his purchase. But the remedy, however, is in a court of equity for relief; for a court of law will treat it as a valid sale unless there is fraud. The practice is uniform and the principle well settled in these cases, that the court may, on setting aside these sales, and on ordering a re-sale, order a reference to the Master to ascertain the amount of the purchase money and interest, the value of improvements, if any, and also to take an account of the rents. And a decree is always made to re-imburse these sums, after deducting the value of the rents, etc., out of the amount derived from the re-sale; or if there is no re-sale, then these sums will be ordered to be re-imbursed, and the premises ought to be subject to refund the amount.⁶⁸

§ 510. Upon the question at what time the account should

⁶⁶ *Ib.*; *Thorp v. McCullum*, *supra*.

⁶⁷ *Lockwood v. Mills*, 39 Ill. 602; *Jackson ex dem. v. Walden*, 14 Johns. 407. *Thorp v. McCullum*, *supra*.

⁶⁸ *Thorp v. McCullum*, *supra*, and authorities cited.

begin, *Lawrence, J.*, in *Miles v. Wheeler*, 43 Ill. 43, said: "There is no fixed rule upon this question. Each case depends upon its own circumstances, as in reference to what length of time shall bar relief. The general rule to be gathered from the cases is, that, where there has been great *laches* on the part of the complainant, and the defendant has not been guilty of positive fraud, the account will be taken from the commencement of the suit. But where the complainants are infants, and there has been no *laches* in bringing the bill, or the defendant is chargeable with fraud, the account will be carried back to the time when the fraudulent possession began."

§ 511. Section 110 provides that, "When real estate is sold, the moneys arising from such sale shall be received by the executor or administrator applying for the order to sell, and shall be assets in his hands for the payment of debts, and shall be applied in the same manner as assets arising from the sale of personal property."

CHAPTER XXXVIII.

SALE OF REAL ESTATE TO PAY DEBTS.

PART III. CONCERNING DOWER IN CASE OF SALE OF LANDS TO PAY DEBTS. HOMESTEAD EXEMPTION.

§ 512. Dower — County courts have jurisdiction on the petition of the widow, or personal representative to cause it to be assigned when application is made for sale of land.

513, 514. Of what the widow will be endowed — Statutory provisions.

515, 516. Equitable estates subject to dower.

517-519. Other cases.

520. Dower and homestead interests are independent of each other — dower exists in homesteads.

521. The personal representative not bound to apply for assignment of dower, — purchaser takes lands subject to widow's dower — widow's rights till dower assigned.

- § 522. The better course to assign dower before making the order to sell.
523. General remarks on the homestead exemption.
524. County courts have no statutory power to set off the homestead.
525. Homestead — statutory provisions defining it and the rights of parties respecting it.
526. Decisions of courts upon the statute.
528. Homestead right does not avail against purchase money of premises. Purchase money defined.
529. Nor does it exist as against a prior judgment lien or mortgage.
530. Exemption in favor of children.
531. Dower and homestead interests as separate.

§ 512. County courts have jurisdiction in the assignment of dower, in cases where the personal representative petitions for the sale of real estate to pay debts. In such cases if it appears to the court that there is a dower interest in the land sought to be sold, the court may, on the petition of the person entitled to dower, or the personal representative of the deceased, appoint commissioners to assign dower in such real estate, to the person entitled thereto, in the manner provided by law for the assignment of dower by commissioners, by circuit courts of this state.¹

§ 513. For the purposes of administration it is sufficient to say, that a widow will be endowed of the third part of the lands whereof her husband was seized of an estate of inheritance, at the time of his death. Equitable estates are subject to dower; so is all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his death.² Widows of aliens are entitled to dower³; so, if the husband executed a mortgage of lands before marriage, his widow is entitled to dower therein as against every person except the mortgagee, and those claiming under him.⁴ Where the husband, during marriage, purchases land and mortgages the same, to secure the purchase money thereof,

¹ Laws of 1859, p. 92; Gross' Stat. 220, § 36. For forms in case of dower, see notes to Forms of Petition and Order of Sale, etc., Nos. 70 and 76 and comments.

² Gross' Stat. 216, Tit. Dower, § 1.

³ *Ib.* § 2.

⁴ *Ib.* § 3.

his widow is not entitled to dower as against the mortgagee or those claiming under him, although she did not unite with him in executing the mortgage; but she is entitled to her dower as against all others.⁵ If the mortgagee, or those claiming under him, mentioned in the two preceding sections, shall, after the death of the husband, cause the land to be sold upon foreclosure, and any surplus shall remain after the payment of the moneys due on such mortgage, and the costs and charges of sale, such widow will be entitled to the interest or income of one-third part of the surplus for life, as her dower.⁶ But she takes no dower in lands conveyed to the husband by way of mortgage, unless he has acquired an absolute estate during the marriage.⁷

§ 514. When an estate in land is conveyed to a person and his intended wife, or to her alone, or to any person in trust for them, or in trust for her alone, for the purpose of creating a jointure for such intended wife, and with her assent to be taken in lieu of dower, the jointure will be a bar to any right or claim for dower of such wife, in any land of her husband.⁸ Her assent to such jointure must be evinced, if she is of full age, by her becoming a party to the conveyance by which it shall be settled; and if she is an infant, by her joining with her father or guardian in such conveyance.⁹ If, before her marriage, but without her assent, or if after her marriage, land is given or assured for the jointure of the wife in lieu of dower, she must make her election, whether she will take such jointure, or whether she will be endowed of the lands of her husband, but she is not entitled to both.¹⁰

Every devise of land or any estate therein, will bar her dower in lands, or her share in personal estate, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the

⁵ *Ib.* § 4.

⁶ *Ib.* § 5.

⁷ *Ib.* § 6.

⁸ *Ib.* § 7.

⁹ *Ib.* § 8.

¹⁰ *Ib.* § 9.

benefit of such devise or bequest, and take her dower in the lands, and share in the personal estate of her husband.¹¹ If the husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have in lieu of dower in the estate of which her husband died seized, whether the same shall have been assigned or not, absolutely and in her own right, as if she were sole, one-half of all real estate which shall remain after the payment of all just debts and claims against the deceased husband: *Provided*, that in case dower in such estate shall have been already assigned, she shall make such new election, within two months after being notified of the payment of such debts and claims.¹²

§ 515. Under the statutes relating to dower it is now settled that a widow can be endowed of estates of inheritance only,¹³ and dower in equitable estates is also confined to such only as are estates of inheritance.¹⁴ The husband must have such an equitable estate as gives him a right to be invested with the legal title, in order to entitle the widow to dower.¹⁵ Where land is purchased by contract, and time is given for the payment of any part of the purchase money, the husband is not vested with such an estate as confers the right of dower unless he pays the money and entitles himself to a conveyance. If he has not in his lifetime been entitled to a conveyance, his widow cannot claim dower at his death, unless the purchase money shall be paid for the benefit of his heirs.¹⁶

§ 516. Where the deceased has contracted to convey real estate, and dies before the conveyance is completed, moneys due him on the contract are a part of his personal estate, and if the widow receives her share, she must relinquish her

¹¹ *Ib.* § 10.

¹² *Ib.* § 15. And see particularly as to the construction put by courts upon sections 10 and 15. *Ante*, note to Will, Form No. 1, § 210.

¹³ *Davenport v. Farrar*, 1 Scam. 314; *Stribling v. Ross*, 16 Ill. 122.

¹⁴ *Davenport v. Farrar*, *supra*; *Atkin v. Merrill*, 39 Ill. 62.

¹⁵ *Stow v. Steel*, 45 Ill. 328; *Steele v. Magic*, 48 Ill. 396.

¹⁶ *Stow v. Steel*, *supra*; *Strawn v. Strawn*, 46 Ill. 412. She is not dowerable out of land where the husband assigned a contract for the purchase. *Owen v. Robbins*, 19 Ill. 554.

dower.¹⁷ And where the personal representative pays the purchase money for land out of the money of the estate, and receives a deed therefor, executed prior to the death of the intestate, in pursuance of a contract entered into before his death, the widow is entitled to dower in the premises, but cannot elect to take one-third of the purchase money.¹⁸

§ 517. If the husband holds land in trust for another, the wife of the trustee is not entitled to dower; but until the establishment of the trust, the widow is *prima facie* entitled to dower.¹⁹

§ 518. Dower attaches to wild lands.²⁰

§ 519. The fact that there are children, in nowise affects the widow's right to dower.²¹ And where a party dies intestate, leaving no lineal descendants, his widow will take one-half of his lands in fee, and dower in the other half; but the dower in the last half cannot be one-third of the whole.²²

§ 520. Dower and homestead interests are independent of each other. And the mere fact that a widow is occupying one of several distinct parcels of land as a homestead, in each of which she is entitled to dower, will not authorize the allotment of her entire dower interest in all the parcels out of that portion occupied as a homestead.²³

§ 521. The statute authorizing county courts to assign dower does not compel the personal representative to take any steps to have this done in case of a sale by him of lands to pay the debts of the deceased. Whether he will do so or not, is a matter of discretion. We have seen, ante, § 503, that the pur-

¹⁷ *Skinner v. Newberry*, 51 Ill. 203.

¹⁸ *Strawn v. Strawn*, 46 Ill. 412. In this case Strawn had purchased from a man in Kentucky, who had executed the deed before Strawn's death, and placed it in the hands of his agent in Jacksonville, Strawn's widow, as administratrix, paid the money, and then claimed one-third as much money as she had paid.

¹⁹ *Bailey v. West*, 41 Ill. 290.

²⁰ *Schnebly v. Schnebly*, 26 Ill. 116.

²¹ *Skinner v. Newberry*, 51 Ill. 203.

²² *Ringhouse v. Keever*, 49 Ill. 470.

²³ *Peyton v. Jeffries*, 50 Ill. 143; *Walsh v. Reis*, ib. 477.

chaser takes lands purchased at an administrator's sale subject to all encumbrances thereon. But, as the widow is entitled in all cases to retain the full possession of the dwelling house in which her husband most usually dwelt next before his death, together with the out-houses and plantation thereto belonging, free from molestation and rent, until her dower is assigned;²⁴ and, as all other lands of the deceased are liable to contribute towards her dower, and, as the adjustment of dower is always uncertain and sometimes expensive, it would generally be difficult to sell such lands for their full value before the rights of those interested are settled by the allotment of dower to her. The best interests of all parties may therefore require that dower be allotted to her before the order of sale is granted, so that the purchaser may know what he is buying, and the widow the extent of her rights. (For form of petition, see comments on Form No. 70.)

§ 522. It would seem that the proper course to pursue in case either the personal representative or the widow seeks to have dower assigned, is to complete the assignment thereof before an order of sale is made. (For form of order appointing commissioners to assign dower, see Form No. 76. Form of commissioners' oath and report, see Forms No. 77 and 78. Form of order approving report of commissioners, No. 79, and see note to Form No. 70.)

§ 523. We have just been considering the subject of the dower interest of the widow, which can in general be easily and satisfactorily disposed of. But there is another right which the widow or minor children may have in all or a portion of the real estate of the deceased, which, owing to its recent creation by statute, is not very fully understood in its bearing upon the settlement of estates. Heretofore courts have interpreted the homestead statute mainly with reference to its effect upon conveyances and judgment liens. The statute is not, in respect to the interests of the widow and minor children in the homestead, sufficiently definite to be satisfactory. However these may be

²⁴ Gross' Stat. 219, Tit. Dower, § 27; Frank v. Baxter, 48 Ill. 406.

defined hereafter by judicial determination, the questions arising out of them will be embarrassing for a long time yet.

Sometimes it may be advisable for the personal representative to delay for years the sale of land to pay debts, as was the case in *Burson v. Goodspeed*, 5 Leg. News, 242, in order to save sacrificing the property. In that case the land was subject to both dower and homestead rights.

§ 524. The statute does not appear to have conferred jurisdiction upon county courts to dispose of questions arising out of homestead exemptions in the settlement of estates. Therefore, where their determination is absolutely essential to do complete justice to all parties, in proceedings by the personal representative to sell real estate for the payment of debts, it would seem that courts of equity were the proper places to seek relief.

§ 525. The statute, Laws of 1873, title Homestead Exemption, section 1, provides, in substance, that every householder, having a family, shall be entitled to an estate of homestead, to the extent in value of one thousand dollars, in the farm or lot of land and buildings thereon owned or rightly possessed, by lease or otherwise, and occupied by him or her as a place of residence; and that the same shall be exempt from sale for the payment of the debts of such occupant, and from the law of descent and devise; and section 2 provides that such exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age. Section 6 provides that, when a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not have been subject in the hands of such owner; and the proceeds thereof, to the extent of the amount of one thousand dollars, shall be exempt from execution or other process for one year after the receipt thereof by the person entitled to the exemption; and if reinvested in a homestead the same shall be entitled to the same exemption as the original homestead. By section 7 it is provided that, if a building so exempted is insured in favor of the person entitled to

the exemption, and a loss occurs entitling such person to the insurance, the money received shall be exempt to the same extent as the building would have been if not destroyed.²⁶

§ 526. What constitutes a homestead is clearly defined by the statute. 1st. It consists of land or a lot and buildings thereon. 2d. They must be owned or rightly possessed, by lease or otherwise, by the debtor. 3d. They must be occupied by him as a residence. 4th. He must be a house-holder, having a family.

I. The homestead may consist of more than one lot or tract of land, but they must adjoin each other and be used as one lot.²⁶ It does not include separate lots or tracts not adjoining or contiguous, not even if one of them is a wood-lot.²⁷ Nor does the homestead exemption attach to a tenement, the ownership of which is disconnected from the soil on which it stands. Only the owner of the land, his widow and heirs, and not the owner of the building, have the right to claim the benefit of this statute.²⁸

II. The homestead exemption attaches by the express language of the statute to fee simple and leasehold estates. An estate for life is within the statute,²⁹ so is the equitable title to land under a contract of purchase.³⁰ When a parol partition between tenants in common is made, and followed by several possession, each can claim the homestead right in the share he possesses.³¹

III. The premises must be occupied by him as a residence.

²⁵ The act of 1873, Tit. Homestead Exemption, so far as quoted herein, is the same as that of 1872, with two exceptions; the value of property exempt was by the latter fixed at \$1,500, and the last clause of sec. 6 above quoted, was added by the act of 1873.

²⁶ *Walters v. People*, 28 Ill. 194; *Thornton v. Boyden*, 31 Ill. 200.

²⁷ *Walters v. People*, supra. See *Reinbach v. Walter*, 27 Ill. 393, wherein, Caton, J., intimates an opinion upon a hypothetical case.

²⁸ *Brown v. Keller*, 32 Ill. 151. This was decided under the former statute in which the words "or rightly possessed" were not contained.

²⁹ *Deere v. Chapman*, 25 Ill. 610.

³⁰ *Blue v. Blue*, 38 Ill. 9.

³¹ *Tomlin v. Hilyard*, 43 Ill. 300.

But the debtor may leave his homestead for temporary purposes without losing his claim; but the intention to return must be clearly manifested.³² Where the claimant removed to another state with his family, and remained there two years and then returned, declaring when he went that he expected to remain, and after he returned declaring that his intention when he left was to remain away, but it was his interest to return,—it was held that he lost the protection of the homestead exemption; likewise that he might, after so long a time, be regarded as having abandoned his homestead, without reference to what he said before or after his return.³³ The abandonment of the homestead will not be presumed from the fact that the head of the family is in search of another home, if, being disappointed, he may return to the old one; the first would remain until the second should be acquired.³⁴ The exemption is also continued for the benefit of the surviving husband or wife, so long as he or she continues to occupy the homestead, and of the children until the youngest becomes twenty-one years of age. But the abandonment of the homestead by the widowed mother has been held not to prejudice the rights of the children; for occupancy of the homestead may be by means other than that of actual residence on the premises, by the widow and child. The widow can do no act by which the child can be deprived of the right to the homestead. The right of the child is independent of her right in this respect, and she cannot waive or destroy it;³⁵ therefore, while a release by the widow of her interest in the homestead right is valid as to her, it will not affect the right of the minor children.³⁶ The idea of a homestead right of the widow in the land of her husband implies that it was owned and occupied by the deceased as his home, and is so occupied by his widow.³⁷ An actual residence

³² *Wright v. Dunning*, 46 Ill. 271; *Cipperly v. Rhodes*, 53 Ill. 346; *Wiggins v. Chance*, 54 Ill. 175.

³³ *Cabeen v. Mulligan*, 37 Ill. 230.

³⁴ *Walters v. People*, 21 Ill. 179; *Kitchell v. Burgwin*, *Ib.* 40.

³⁵ *Walters v. People*, *supra*.

³⁶ *Miller v. March*, 27 Ill. 402.

³⁷ *Knapp v. Gass*, 5 Leg. News, 111.

on the property, however, is not always necessary.³⁸ In *Walters v. People*, 18 Ill. 194, the widow had not left the premises with intention of abandoning them, but returned thereto as soon as her health would permit, which was in about eleven months after her departure, and the object of her leaving was to receive the care and attention of her friends while in feeble health, occasioned by her approaching confinement; she remained at her father's house until her child was born, who was an heir to her deceased husband, and for some time after, till she recovered her health, and she had rented the land during her absence, making no reservation of any part of the land, or of the house, and left no furniture there. It was held that the widow had not forfeited her right to the homestead. The desertion of the family by the husband, leaving them still occupying the homestead, is not an abandonment of it as a homestead. It still continues the home and residence of the husband, as well as the family.³⁹

IV. The deceased husband must have been a householder, having a family. Having a wife is having a family, and the fact of his residing upon the land would make the debtor a householder.⁴⁰

§ 528. A homestead right does not exist in land as against a liability incurred for the purchase or improvement thereof.⁴¹ Purchase money under this statute, as well as that in relation to dower does not include money borrowed to pay for the premises, but only the money owing to the vendor of such premises, or those claiming through him, for the premises themselves.

§ 529. Nor does a homestead right exist as against a prior judgment lien or mortgage.⁴²

§ 530. Where the exemption is continued to a child or children, it cannot be released without an order of a court directing the release thereof.⁴³

³⁸ See *Vansant v. Vansant*, 23 Ill. 536.

³⁹ *Moore v. Dunning*, 29 Ill. 130.

⁴⁰ *Kitchell v. Bergwin*, 21 Ill. 40.

⁴¹ Stat. 1873, Tit. Homestead, § 3.

⁴² *Rheinbach v. Walter*, 27 Ill. 393; *McCormick v. Wilcox*, 25 Ill. 274.

⁴³ Stat. § 4.

§ 531. We have seen that dower and homestead interests are independent of each other,⁴⁴ as the widow may possess the former while the latter may belong only to the minor child of the deceased. And the homestead must contribute to the dower, as well as the other property.⁴⁵ But the fact that a widow is occupying one of several distinct parcels of land as a homestead, in each of which she is entitled to dower, will not justify the allotment of her entire dower interest in all the parcels out of that portion occupied as a homestead.⁴⁶

CHAPTER XXXIX.

RENUNCIATION OF THE WILL BY THE WIDOW OR SURVIVING HUSBAND.

§ 531. Renunciation of will—how done—limitation effect.

532. Effect upon legacies and bequests to others.

§ 531. The statute, title Administration, section 78, provides that, "The widow or surviving husband of a testate may, at any time within one year from the time at which the will of her or his testate husband or wife was admitted to probate, renounce in writing all her or his claim to the legacies and bequests made for her or him in such will; in which case she or he shall be allowed the same property as if the husband or wife had died intestate."¹ (See Form No. 84.)

§ 532. Section 79 provides that, "In all cases where a

⁴⁴ *Peyton v. Jeffries*, 50 Ill. 143; *Walsh v. Reis*, 50 Ill. 477.

⁴⁵ *Skinner v. Newberry*, 51 Ill. 203.

⁴⁶ *Peyton v. Jeffries*, *supra*.

¹ Concerning the renunciation by widows of the benefits of provisions in wills in their favor, and its effect under §§ 10 and 15 of the statute in relation to Dower, see *ante*, § 210, where these sections are cited, together with decisions thereon.

widow or surviving husband shall renounce all benefit under the will, and the legacies and bequests therein contained, to other persons, shall, in consequence thereof, become diminished or increased in amount, quantity or value, it shall be the duty of the court, upon settlement of such estate, to abate from or add to such legacies and bequests in such manner as to equalize the loss sustained or advantages derived thereby, in a corresponding ratio to the several amounts of such legacies and bequests, according to the amount or intrinsic value of each."

CHAPTER XL.

DESCENT OF PROPERTY.

§ 533. Statutory provisions.

533*a*. The rights of heirs, devisees and legatees in the estate vest at the moment of the decease— but as to what time the right of the widow to her award vests, is unsettled.

§ 533. The act of 1872, title Descent of Property, provides as follows:

Section 1. That estates, both real and personal, of residents and non-resident proprietors, in this state, dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after¹ all just debts and claims against such estates are fully paid, shall descend to and be distributed in the manner following, to-wit:

First.—To his or her children and their descendants, in equal parts; the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them.

¹ The meaning of this section would be more clear if it read thus: That estates within this state, both real and personal, of resident and non-resident proprietors, dying intestate, or any part of such estates deemed and taken as intestate estate, after, etc.

Second.—When there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased, and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants.

Third.—When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then, after payment of all just debts, one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband, as an absolute estate forever.²

Fourth.—When there is a widow or a surviving husband, and also a child or children, or descendants of such child or children of the intestate, the widow or surviving husband shall receive as his or her absolute personal estate, one-third of all the personal estate of the intestate.

Fifth.—If there is no child of the intestate, or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate, in equal degree—computing by the rules of the civil law—and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood.

Chancellor *Kent* (4 Com. 407), treating upon the question, who are next of kin by the civil law after descendants, parents and brothers and sisters, refers to the provisions of the para-

² By this section each is made an heir to the other, *Sturgis v. Ewing*, 18 Ill. 176; *Ringhouse v. Kever*, 49 Ill. 470. But the widow may find it preferable to have her dower in the real estate. See ante, § 210, where the widow's right of election under sections 10 and 15 of the statute Tit. Dower, are explained with reference to their effect upon this statute. In *Tyson v. Postlethwaite*, 13 Ill. 727, it was held that this clause is not in conflict with § 15 of the Stat. Tit. Dower, quoted ante, § 514. See also, ante, § 519.

graph last quoted from the statute, and says, grandparents take the estate before uncles and aunts. And on page 408, he says: "In default of lineal descendants, and parents, and brothers and sisters and their descendants, and grandparents, the inheritance goes to the brothers and sisters equally, of both the parents of the intestate, and their descendants. If all stand in equal degrees of consanguinity to the intestate, they take *per capita*; and if in unequal degrees, they take *per stirpes*."

Sixth.—If any intestate leaves a widow or surviving husband, and no kindred, his or her estate shall descend to such surviving widow or husband.

Seventh.—If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the state.

Section 2.—An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living.

Second.—The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases.

Third.—In case of the death of an illegitimate intestate, leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband.

Fourth.—When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants—one half to the mother, and the other half to be equally divided between her children and their descendants—the descendants of a child taking the share of their deceased parent or ancestor.

Fifth.—In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law.

Sixth.—When there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise.

Where a minor child has been adopted, under the statute (Laws of 1867, p. 133; Gro. Stat. p. 319, § 38), by any person, for the purpose of enabling him to inherit from the adopted father or mother, such child will inherit from the person adopting him as if the relation of parent and child existed between them; but the adopted father or mother cannot inherit from the child; and to all other persons the adopted child stands, for the purposes of inheritance, as if there was no such adoption.

Section 3. An illegitimate child whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.

Section 4. Any real or personal estate given by an intestate in his lifetime as an advancement to any child or lineal descendant, shall be considered as part of the intestate's estate, so far as it regards the divisions and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate; but he shall not be required to refund any part thereof, although it exceeds his share.

Section 5. If such advancement is made in real estate, and the value thereof is expressed in the conveyance or in the charge made thereof by the intestate, or in the written acknowledgment thereof by the party receiving it, it shall be considered as of that value in the divisions and distribution of the estate; otherwise, it shall be estimated* according to its value when given.

Section 6. If such advancement is made in personal estate of the intestate, the value thereof to be estimated the same as that of real estate; and if, in either case, it exceeds the share of real or personal estate, respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less of the other part of the intestate's estate as will make his whole share equal to the shares of other heirs who are in the same degree with him.

Section 7. No gift or grant shall be deemed to have been

made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant.

Section 8. If a child or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them.

Section 9. A posthumous child of an intestate shall receive its just proportion of its ancestor's estate in all respects as if he had been born in the lifetime of the father.

Section 10. If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate; and a marriage shall be deemed a revocation of a prior will.

Section 11. Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed, as the devisee or legatee would have done had he survived the testator; and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate.

Section 12. All such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person shall be distributed in the same manner as the estate of an intestate; but in all such cases the executor or executors, adminis-

trator or administrators with the will annexed, shall have the preference in administering on the same.

Section 13, after repealing former statutes, provides that, nothing contained in this section (13) shall be so construed as to affect any suits that may be pending, or any rights that have accrued at the time this act shall take effect. (July 1, 1872.)

§ 533a. It is perfectly well settled that the rights of heirs, devisees and legatees in the estate vest from the moment of the decease. So, also, that the interest of a distributee of the personal estate, who dies thereafter, will go to his personal representative, and not to his heirs.³ And this principle applies as well to the distributive share belonging to the widow, as to those shares belonging to other heirs of the deceased.⁴

So, also, does the right of the widow to the specific articles allowed to her upon the death of her husband, vest in her and not in the administrator. And should she die before reducing those articles or their value to possession, and before administration is granted upon the husband's estate, her administrator may sue for and recover the value from her husband's estate.⁵

³ 1 Redf. Wills, § 30 b. pl. 3, 4, 5, 6. Ante, § 226.

⁴ Mills v. Marshall, 8 Ind. 54: See Cross v. Carey, 25 Ill. 562.

⁵ York's Adm'r v. York's Adm'r, 38 Ill. 522. It was likewise held in this case, that it is not the duty of the appraisers of the estate of the husband, to set apart the specific articles to the widow, but simply to certify their value to the county court. Also, that it is the duty of the administrator of the husband's estate to set them off to the widow or to her administrator, and if he fails to do so, it would be evidence of a conversion, and he would be liable for their value, if such articles or their value belonged to the husband's estate. Also that in a suit therefor against the personal representative of the husband, it must be shown that these specific articles, or their value in money or other property belonged to the husband's estate at the time of his death.

The facts of this case are not fully set out in the report. But it appears that the widow survived her husband only ten days, and that administrators for both estates were appointed shortly after the widow's death, and *perhaps*, that no appraisers of the husband's estate were appointed. They had no children, nor had the widow any family living with her, or minor children. The widow's administrator, thirteen months after administration granted, filed his claim in the county court for the value of the specific articles, and it was disallowed, but on appeal to the circuit court, he recovered two hundred and forty-six dollars. The report does not show

CHAPTER XLI.

SETTLEMENT AND DISTRIBUTION.

- § 534. General view of the subject—Duty of the personal representative to exhibit his accounts to the court annually — may be required by the court to do so oftener. Final settlement—discharge—notice of final settlement.
535. Statutory provisions.
- 536, 537. What the personal representative is bound to account for.
538. If the estate is insufficient to pay all of the debts,—the court to make an order apportioning the moneys, etc.
539. If the personal representative fails to plead the statute of limitations to a claim against the estate, the heirs may plead it on settlement or may have a remedy on his bond.
540. The case of *Heward v. Slagle*—special circumstances.
541. Personal representatives in some cases may be compelled to pay over to heirs and legatees a portion of the dividend, etc.
542. And he may pay debts before ordered by the court.
543. Courts of equity have paramount jurisdiction in cases of administration, and may control courts of law, etc.
544. County courts required to enforce settlement of estates—citation—attachment—contempt—removal—costs.
- 544a. Personal representative liable for interest in certain cases.
545. If personal representative fails or refuses to pay over moneys, he may be attached—may be liable on his bond for *devastavit*.
546. The same subject.
547. Of the demand for payment.
548. Payment of legacies—the order of their payment.

what the items of the claim were, nor the evidence to support the claim, so we can only conjecture the reason of so small a verdict.

Now, the award being merely a statutory provision, and the statute having directed how and by whom it is to be estimated and set off, it appears to me that the statutory proceeding only should have been pursued. The widow's administrator should have asked the county court to require the appraisers to make the estimate, and direct the administrator to set off the articles. If they refused to act, new appraisers should have been appointed. There is a sort of discretion given appraisers in these cases, and there is, besides, a propriety in their performing this duty rather than the county judge or a jury. They are usually neighbors, and know or can know all the facts concerning the widow and her family and the husband's estate much better than a judge or jury could well be made to understand them.

§ 549. Refunding bond may be required.

550. Tender of a refunding bond dispensed with under peculiar circumstances.

551. The county court to apportion payment on refunding bonds — refusal by distributee or legatee — action to be instituted.

552. When there are two or more personal representatives and one of them takes all or a greater part of the estate and refuses to account with the other — the remedy.

553. Insolvent estates — when found to be so, entered of record — persons entitled to receive their proportions.

554. Unclaimed money to be deposited with the county treasurer — persons entitled thereto, how they may proceed to get it.

§ 534. At the first term after the expiration of one year from the date of his letters, and annually thereafter, it is the duty of the personal representative to exhibit his accounts of administration to the county court, and he may be oftener required by the court to do so, until the administration is completed. And the court may order a partial distribution of moneys of the estate when these settlements are made. After two years have elapsed from the date of his letters, if all the assets have been collected and the debts of the estate have been established, he should make a final settlement, when the court will order a distribution of the moneys and other property remaining in his hands, among the parties entitled thereto; and upon his compliance with such order, and the satisfactory showing thereof, the court will make a further order approving of the same. But the statute provides that no final settlement shall be made and approved by the court, unless the heirs of the decedent have been notified thereof, in such manner as the court may direct. This notice might properly be in writing, and served on them personally, or by mailing properly addressed to them. (For forms of settlement, order of distribution and of discharge, see Forms No. 85 to 90.)

§ 535. The statute, section 112, provides that, "All executors and administrators shall exhibit accounts of their administration, for settlement, to the county court from which the letters testamentary or of administration were obtained — at the first term thereof after the expiration of one year after the

date of their letters; and in like manner every twelve months thereafter, or sooner, if required, until the duties of their administration are fully completed: *Provided*, that no final settlement shall be made and approved by the court, unless the heirs of the decedent have been notified thereof, in such manner as the court may direct."

§ 536. We have seen elsewhere, under the heads of "Inventory" and "Collection of Assets," the principal things which the personal representative is bound to account for as assets; but there are certain other assets which he is liable for and which he should charge himself with, in his account,—such as rents of lands purchased by him in payment of debts due the estate. From these, however, are to be deducted taxes, repairs and other necessary expenses.¹ He is also chargeable, as we have elsewhere seen, for interest and profits derived from moneys and personal property of the estate.² He will be liable for interest in certain other cases, where he has not complied with the statute. (See post, § 545.)

§ 537. Where the administrator had made profits out of the funds of the estate, by purchasing therewith bank paper at a discount, and with it paid debts of the estate, he was required to account to the estate for those profits. But he was allowed to charge for necessary and reasonable outlays and expenditures in procuring such bank paper. He had a right to an allowance for his own means used in doing this, and interest thereon, and for his traveling expenses and time employed in the transaction. The remainder of the profits belonged to the estate.³

§ 538. Section 113 provides that, "Upon such settlement of the accounts of an executor or administrator, the court shall ascertain the whole amount of moneys and assets belonging to the estate of the deceased, which have come into the hands of such executor or administrator, and the whole amount of the debts established against such estate; and if there is not sufficient to pay the whole of the debts, the moneys aforesaid shall

¹ Kruse v. Steffens, 47 Ill. 112.

² Rowan v. Kirkpatrick, 14 Ill. 1.

³ Wingate v. Pool, 25 Ill. 118.

be apportioned among the several creditors pro rata, according to their several rights, as established by this act; and thereupon the court shall order such executor or administrator to pay the claims which have been allowed by the court, according to such apportionments; and the court, upon every settlement, shall proceed in like manner until all the debts due are paid, or the assets exhausted." (See Form No. 91.)

§ 539. In *Stillman v. Young*, 16 Ill. 318, it was held that the failure of the personal representative to plead the statute of limitations to a claim presented against the estate will not bar or preclude the heirs from pleading it on settlement.⁴ But they may also have a remedy on his bond, where he is guilty of laches in not defending a suit at law.⁵

§ 540. In *Heward v. Slagle*, 52 Ill. 336, where the circumstances were peculiar, and the proceedings of the personal representative such as to seriously complicate the case, the court said, "The probate court in a case of this kind should, on trial of it, proceed as though a bill in chancery had been filed, hear the evidence, and investigate the account without the intervention of a jury, unless it should be necessary to impanel a jury to try some issue of fact that may be made up, as in chancery cases."

§ 541. The court may cite the personal representative and order him to pay over to an heir as well as a legatee a portion of the dividend to which he is entitled, whenever it shall appear that there are assets to satisfy all demands against the estate; and this may be done at any time after letters are granted. A year need not elapse first. Such an order is not a judgment against the personal representative to be satisfied in due course of administration, but may be enforced by an attachment for contempt. Nor is such an order regarded as an order for the support of the heir, though his necessities may have prompted him to ask for the distribution.⁶

⁴ See ante, § 386.

⁵ *Gold v. Bailey*, 44 Ill. 491.

⁶ *Reynolds v. People*, 55 Ill. 328. And the citation and attachment should run in the name of the people.

§ 542. And the personal representative may pay debts of the estate before orders of the court are made.⁷ It can be a *devastavit* only in case some other creditor or distributee is injured by it.

§ 543. Courts of equity have paramount jurisdiction in cases of administration and settlement of estates, and may control courts of law in their settlement and distribution.⁸ In *Townsend v. Radcliffe*, the personal representative had made final settlement with the county court, and been ordered by that court to pay over the balance in his hands to the persons legally entitled to receive it, without determining who the proper distributees were, and the court held that it was a proper subject for relief in equity.

§ 544. Section 114 provides that, "The county courts of this state shall enforce the settlements of estates within the time prescribed by law, and upon the failure of an executor or administrator to make settlement at the next term of the court after the expiration of said time, the court shall order a citation to issue to the sheriff of the county where the executor or administrator resides, or may be found, requiring said executor or administrator to appear at the next term of the court and make settlement of the estate, or show cause why the same is not done; and if an executor or administrator fails to appear at the time required by such citation, the court shall order an attachment requiring the sheriff of the county where the executor or administrator resides, or may be found, to bring the body of said executor or administrator before the court; and upon a failure of an administrator or executor to make settlement under the order of the court after having been so attached, he may be dealt with as for contempt, and shall be forthwith removed by the court, and some discreet person appointed in his stead; the costs of such citation or attachment to be paid by the delinquent executor or administrator, and the court

⁷ *Walker v. Craig*, 18 Ill. 116.

⁸ *Grattan v. Grattan*, 18 Ill. 171; *Townsend v. Radcliffe*, 44 Ill. 446; 1 Story's Eq. Jur. Chap. 9.

shall enter a judgment therefor, and a fee bill may issue thereon." (For citation and orders, see Forms No. 92-95.)

§ 544a. The same section (No. 114), further provides that, "All moneys, bonds, notes and credits which any administrator or executor may have in his possession or control as property or assets of the estate, at a period of two years and six months from the date of his letters testamentary or of administration, shall bear interest, and the executor or administrator shall be charged with interest thereon from said period at the rate of ten per cent., or after two years and six months from any subsequent time, that he may have discovered and received the same, unless good cause is shown to the court why such should not be taxed."

§ 545. Section 115 provides that, "If any executor or administrator shall fail or refuse to pay over any moneys or dividend to any person entitled thereto, in pursuance of the order of the county court, lawfully made, within thirty days after demand made for such moneys or dividend the court, upon application, may attach such delinquent executor or administrator, and may cause him to be imprisoned until he shall comply with the order aforesaid, or until such delinquent is discharged by due course of law; and moreover, such failure or refusal on the part of such executor or administrator shall be deemed and taken in law to amount to a *devastavit*,^a and an action upon such executor's or administrator's bond, and against his securities, may be forthwith instituted and maintained; and the failure aforesaid to pay such moneys or dividend, shall be sufficient breach to authorize a recovery thereon." (See forms under this section Nos. 96-99.)

§ 546. The county court can only make an order to pay over moneys under section 115. It has no power to render a judgment in favor of the heirs or legatees, against the personal representative, for failing or refusing to pay over to such heirs or legatees their portions of the estate of the deceased. If he fails or refuses to comply with the order of the court, requiring him to make such payment, the remedy is by attachment for con-

^a He may be removed. Ante, § 255,

tempt of court.¹⁰ The order directing the payment is conclusive unless appealed from, and if not complied with, entitles the persons in whose favor it is made to recover for a *devastavit* upon the personal representative's bond, against principal and security.¹¹

§ 547. The demand required by the statute was intended to protect parties from needless costs; but where the personal representative dies after an order of distribution, but before demand for payment is made, the securities on his bond cannot shield themselves from a judgment against them, because of the omission. And it is not necessary that an administrator of the deceased personal representative should have been appointed, and demand made on him before commencing suit on the bond.¹²

§ 548. Section 116 provides that, "Whenever it shall appear that there is sufficient assets to satisfy all demands against the estate, the court shall order the payment of all legacies mentioned in the will of the testator, the specific legacies being the first to be satisfied."¹³

§ 549. Section 117 provides that, "Executors and administrators shall not be compelled to pay legatees or distributees until bond and security is given by such legatees or distributees to refund the due proportion of any debt which may afterwards appear against the estate, and the costs attending the recovery thereof; such bonds shall be made payable to such executor or administrator, and shall be for his indemnity and (be) filed in the court." (See bond, Form No. 100.)

¹⁰ *Piggot v. Ramey*, 1 Scam. 145.

¹¹ *Ralston v. Wood*, 15 Ill. 159; *Neubrecht v. Santemeyer*, 50 Ill. 74. The personal assets of an estate become legally vested in the personal representative, and the heirs cannot maintain an action at law, in their own right, for any portion of such personal estate, until an order of court for distribution has been obtained. Then the legal title vests in the distributors. *Ib.*

¹² *People v. Admire*, 39 Ill. 251.

¹³ A specific legacy is a bequest of a particular thing or money specified and distinguished from all other things of the same kind, as of a particular horse, a particular piece of plate, a particular term of years, and the like. *Bouvier's L. D.*

§ 550. Where the personal representative died after an order of distribution was entered, but before demand made on him by the heir for his distributive share of the estate and a refunding bond tendered, and no administrator of the deceased personal representative was appointed; it was held that an action might be sustained by the distributee against the securities on the bond of the personal representative.¹⁴

§ 551. Section 118 provides that, "When, at any time after the payment of legacies or distributive shares, it shall be necessary that the same or any part thereof be refunded for the payment of debts, the county court, on application made, shall apportion the same among the several legatees or distributees according to the amount received by them, except the specific legacies, which shall not be required to be refunded, unless the residue is insufficient to satisfy such debts; and if any distributee or legatee refuses to refund according to the order of the court, within sixty days thereafter, and upon demand made, such refusal shall be deemed a breach of his bond given to the executor or administrator as aforesaid, and an action may be instituted thereon for the use of the party entitled thereto; and in all cases where there is no bond, an action of debt may be maintained against such distributee or legatee, and the order of the court shall be evidence of the amount due." (See forms, under this section, Nos. 101, 102.)

§ 552. Section 119 provides that, "Where there are two or more executors or administrators of an estate, and any one of them takes all or a greater part of such estate and refuses to pay the debts of the decedent, or refuses to account with the other executor or administrator, in such case the executor or administrator aggrieved may have his action of account or suit in equity against such delinquent executor or administrator, and recover such proportionate share of said estate as shall belong to him; and every executor, being a residuary legatee, may have an action of account or suit in equity against his co-executor or co-executors, and recover his part of the estate in his or their hands. Any other legatee may have the like

¹⁴ *People v. Admire*, 39 Ill. 251.

remedy against the executors: *Provided*, that before any action shall be commenced for legacies as aforesaid, the court shall order them to be paid."

§ 553. Section 129 provides that, "If, after the expiration of two years from the time administration is granted on an estate, such estate is found to be insolvent, it shall be so entered of record by the county court and such order made. No action shall be maintained against the executor or administrator of such estate except at the costs of the party suing; but persons entitled thereto shall receive their proportions of such estate as herein provided." (Declaration that the estate is insolvent, Form No. 103.)

§ 554. By the R. S. 1874, title, Escheats, it is provided: "§ 1. That if any person shall die seized of any real or personal estate without any devise, and leaving no heirs or representatives capable of inheriting the same, or the devisees thereof be incapable of holding the same, and in all cases when there is no owner of real estate capable of holding the same, such estate, both real and personal, shall escheat to and vest in the county in which said real and personal estate, or a greater portion thereof is situated." "§ 2. In case said estate shall consist of personal property, letters of administration shall be granted thereon, as in other cases, and the same shall be administered in conformity with the probate laws of this state. Should there be any balance left in the hands of the administrator after the payment of debts and costs of administration, said administrator shall report the same to the probate court, with a statement of all the facts within his knowledge, as to the heirship of said decedent, which facts shall constitute a part of his report, and be spread upon the records of said court; and it shall be the duty of said court to enter an order directing said administrator to pay over the balance found in his hands to the county treasurer of said county, taking his receipt therefor, which receipt shall be filed with the county clerk and entered of record, and shall be a good and sufficient voucher to said administrator. The said county clerk shall also charge said amount to the county treasurer as an escheat fund, especially designating from whose estate the same was derived."

CHAPTER XLII.

MARSHALLING ASSETS.

- § 555, 556. Of the primary fund for payment of debts — order of priority.
557. Testator's intent to change the order of priority — how manifested.
558. Of debts insufficiently secured by mortgage, when the estate is insolvent.
559. Definitions of specific legacies and devises, and residuary legacies and devises.
560. Priority of contribution to payments of debts, as between specific and residuary devises.
561, 562. Of incumbrances on lands created by former proprietor — What fund primarily liable for their payment — How liability changed.
563, 564. Of subrogation to the rights of creditors where debts have been paid out of a fund not primarily liable.

§ 555. In the settlement of estates, questions sometimes arise whether certain debts owing by the deceased, shall be paid, or certain liens and incumbrances upon his property discharged, out of real estate or out of personal property, and which of these shall form a primary fund for that purpose. Questions of this character are treated of in works on equity under the head of marshalling assets. What will here be said upon this subject must necessarily be brief.

§ 556. It is well settled that personal estate is the primary fund for the discharge of debts, and is to be first applied and exhausted, even to the payment of the debts with which the real estate is charged by mortgage; for the mortgage is understood to be merely a collateral security for the personal obligation. The order of marshalling assets in equity towards the payment of debts, is to apply to,

1. The general personal estate.
2. Estates specially and expressly devised for the payment of debts, and for that purpose only.
3. Estates descended.
4. Estates devised, though generally charged with the payment of debts.

It requires express words, or the manifest intent of the testator to disturb this order.¹

§ 557. Upon the question of the testator's intent to vary the usual order of liability of property for the payment of debts, the case of *McCallum v. Chidester*, Ill. Sup. Ct. 1873, 5 Ch. Leg. News, 463, is a good illustration. In that case the court held that where a person owning real and personal estate and owing debts, makes a nuncupative will, disposing of his personal estate, upon his death, the personal property vests in the legatee, according to the terms of the will, and the real estate becomes the primary fund for the payment of the testator's debts; but if this should prove insufficient, the personal estate bequeathed must answer for the deficiency. But where lands are devised "subject to the payment of the testator's just debts," this is not sufficient to change the order of liability. These words provide no more than the law applicable to the case had already provided. The lands were by law liable to the payment of debts if the personal estate was insufficient for that purpose. In order to relieve the personal estate from its prior liability and subject other property to the payment of debts in its place, the estate intended for that purpose must be particularly devised for the payment of the debts, and for that purpose only,² except, as in the case last cited, where the personal estate only was devised, and for another purpose.

§ 558. Where the decedent has secured a debt by mortgage upon his real estate, and this security is insufficient, and the estate is insolvent, courts have not been uniform in their decisions upon the question whether the mortgage creditor may prove up his claim and take his pro rata share of the other assets, and also foreclose his mortgage for the remainder of his debt, or have only his pro rata share of the estate upon the amount due him after deducting the sum realized from the mortgaged property. This question has not been adjudicated by the supreme court of Illinois, but those decisions of other courts which seem to have been best considered, and are most

¹ 4 Kent's Com. 420, and notes; 3 Redf. Wills, § 43, pl. 9, 11, 18 cl. (1.)

² 3 Redf. Wills, § 43, pl. 18, cl. 2, 3, and cases cited.

consistent with the principles of equity, declare that a creditor of an insolvent estate, having a mortgage as security for his debt, of less value than the amount of the debt, can claim against the personal representative only the difference between his debt and the value of the property mortgaged.³

§ 559. The debts and the costs of administration having been paid, the statute next provides for payment of specific legacies. A specific legacy is a bequest of a particular thing, whether animate or inanimate, and it may consist of a definite sum of money or quantity of personal property.⁴ A devise of real estate is always specific.⁵ And a residuary legacy is the estate bequeathed which remains after payment of debts and specific bequests. So a residuary devise is the estate devised which remains after specific devises have been satisfied.

§ 560. Where the bequest of the personal estate and the devise of the real estate are both specific, both must contribute to the payment of debts pro rata.⁶ But as between a residuary devise and a specific devise, the former must be made to contribute to general pecuniary legacies charged upon all of the estate generally.⁷

§ 561. There is one class of burdens which rests primarily upon specific real estate, though embraced within the general mass of indebtedness of the testator. This will embrace all

³ See 3 Redf. Wills, § 43, pl. 15 and notes, where the authorities are stated and discussed, and *Amory v. Francis*, 16 Mass. 308. This subject is one of great difficulty and might properly be considered by the legislature. Perhaps it would be well to require the administrator to sell the mortgaged property as soon as it becomes apparent that the estate is insolvent, and pay the proceeds to the mortgagee; and that the mortgagee should be entitled to his pro rata share of the remaining estate of the deceased on only so much of his claim as thereafter remains unpaid. Where a debt is otherwise secured the distribution should be made on a like principle.

⁴ *Bouvier*, L. D. 2 Redf. Wills, § 7, pl. 1-29; 2 Lead. Ca. Eq. 481.

⁵ 2 Redf. Wills, § 7, pl. 7. But see particularly 3 Redf. Wills, § 43, n. 35, 36, 47, and cases there cited, which throw a reasonable doubt over the rule.

⁶ *Long v. Short*, 1 P. Wms. 408; *Gervis v. Gervis*, 14 Sim. 654; 2 Lead. Ca. Eq. 250. But see contra, *Rogers v. Rogers*, 1 Paige, 188.

⁷ *Spong v. Spong*, 3 Bligh, N. S. 84; *Hensman v. Fryer*, Law Rep. 3 Ch. App. 420.

estates which the testator had acquired, subject to incumbrances created by others.⁸ The purchase of the estate subjects the vendee to the payment or keeping down, of the charge, as an equitable implication from the acceptance of the title. But whether any express covenant or contract is given to that effect is immaterial; the real estate will be regarded as the primary fund from which the payment is to be made, unless there is some direction, or reasonable implication, in the will, that it shall be made from some other special fund, or that it shall rest upon the same basis as the other debts due from the estate.⁹ But if the incumbrance was created by the testator, either before or after the making of the will, it must be paid by the executor out of the personalty, unless there is a clear intention indicated by the will, that the devisee shall take the estate with the burden.¹⁰ And it seems that parol evidence is not admissible to show either directly, or by way of presumption and inference, that it was the testator's intention to have an incumbrance upon a devised estate paid out of his personalty, where the presumption of law is otherwise.¹¹

§ 562. The same rule extends to all incumbrances upon land, devised or descended, where the incumbrance is not the debt of the ancestor. The debt or incumbrance remains a charge upon the land merely, and is not entitled to exoneration out of the personal estate, or out of other lands.¹² It is not sufficient to make the incumbrance a charge upon the personal estate, that the deviser or ancestor might have been compelled to pay the same, as between himself and the original debtor creating the charge.¹³ For it is always the case as between the grantor and the grantee of an incumbered estate.¹⁴ To have

⁸ *Lechmore v. Charlton*, 15 Vesey, 193.

⁹ *Andrews v. Bishop*, 5 Allen, 490. But see *Leming's Est.* 52 Penn. St. 135.

¹⁰ *Gould v. Winthrop*, 5 R. I. 319; *Hoff's Appeal*, 24 Penn. St. 200.

¹¹ *Rapalye v. Rapalye*, 27 Barb. 610; *Swann v. Swann*, 5 Jones' Eq. 297.

¹² *Hewes v. Dehon*, 3 Gray, 205, 208.

¹³ *Scott v. Beecher*, 5 Mad. 96.

¹⁴ *Campbell v. Shrum*, 3 Watts, 60; *Trevor v. Perkins*, 5 Whart. 244.

this effect the devisor or ancestor must have assumed the debt as between himself and the creditor in the incumbrance; and it will not be sufficient that he has entered into a bond or covenant with the debtor to see him harmless in regard to it.¹⁶

§ 563. It is considered a well settled rule in marshalling assets in equity, that wherever a charge is paid from a fund not primarily liable to its payment, the party injured thereby is entitled to be subrogated to the rights of the other creditor, and thus enforce the claim against the fund primarily responsible for its payment.¹⁶

§ 564. A widow who has joined with her husband in the mortgage of her separate estate to secure his debt, and which she has paid since his death, for the purpose of exonerating her estate, may prove the amount against his estate. And a creditor of the estate, whose debt is secured by a mortgage of the wife's separate property, may prove his debt against the estate without first relinquishing his mortgage.¹⁷

CHAPTER XLIII.

LAPSED LEGACIES.

§ 565. Lapsed legacies defined.

566. General rule qualified by statute of Illinois.

567. Instances where legacies lapse.

568. The rule of survivorship among joint legatees.

569. Legatee for life and of the remainder, both dying, the legacy lapses.

570. Language which will prevent the lapse.

571. If no residuary bequest, a lapsed legacy goes to the heir.

¹⁶ Tweddell v. Tweddell, 2 Br. C. C. 101, 152; Butler v. Butler, 5 Vesey, 534; Cumberland v. Codrington, 3 Johns. Ch. 229; 4 Kent, 420.

¹⁶ Johnson v. Child, 4 Hare, 87; Lilford v. Keck, Law Rep. 1 Eq. 347

¹⁷ Savage v. Winchester, 15 Gray, 543.

§ 565. A devise or legacy is said to lapse which fails or takes no effect, in consequence of the death of the devisee or legatee before that of the testator; or other cause.¹ A distinction exists when the matter is not regulated by statute between a lapsed or void devise of real estate, and a lapsed or void bequest of personalty. The former goes to the heir, and the latter falls into the residuum, — goes to the residuary legatee.²

§ 566. The statute of Illinois, 1872, title Descent, § 11, has qualified the general rule. It provides that, whenever, a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator; and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate. And § 12 provides that, all such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate.

§ 567. A legacy to one in trust for another will not lapse by reason of the death of the trustee before the testator;³ but a legacy to one on condition that he attains twenty-one years of age, will lapse if he dies before that age.⁴ And legacies charged upon real estate lapse if the legatee dies before the time of payment.⁵

§ 568. The rule of survivorship among joint legatees is thus stated by Mr. Justice *Metcalf*;⁶ "It is a rule of the com-

¹ Wharton's L. D.

² *Cox v. Harris*, 17 Md. 23; *Brown v. Higgs*, 4 Vesey, 708 n. b. and cases cited (Sumner's Ed.); *Helms v. Franciscus*, 2 Bland. (Md.) 546; and see *Torgree v. Nutwell*, 13 Md. 415; 2 Redf. Wills, § 6, pl. 4 and n. Ante, § 532.

³ *Moggridge v. Thackwell*, 1 Vesey, Jr. 464.

⁴ *Colt v. Colt*, 33 Conn. 270.

⁵ *Lyman v. Vanderspiegel*, 1 Aikens, (Vt.) 275. But see *Birdsall v. Hewlett*, 1 Paige, 32.

⁶ *Jackson v. Roberts*, 14 Gray, 546; *S. P. Stires v. Van Rensselaer*, 2 Bradf. Sur. Rep. 172.

mon law, that a legacy lapses, or is extinguished, by the death of the legatee while the testator is alive. This rule does not apply to legacies given to two or more jointly (in joint tenancy), but does apply to legacies given to two or more as tenants in common, and it is repeatedly stated in the books that when an aggregate fund is bequeathed to several legatees, to be divided among them, by name, in equal shares, if any of them die before the testator, what was intended for such will lapse. But where a legacy is given to a class of persons, in general terms, as tenants in common, as, to all of my brothers, the death of one or more of them before the testator will not cause a lapse of any part of the fund, but the survivors of the class will take the whole."

§ 569. Where both the legatee for life and the one in remainder die before the testator, the whole estate falls into the residue. So where the legacy is given upon a condition precedent not performed.⁷

§ 570. The general rule is, where a legacy is given, and no provision is made that it shall go to the heir or next of kin or personal representative, in some form to clearly indicate that those terms are used to designate the persons described by them, in order to have them take directly under the will, as if they were purchasers, the legacy will lapse in case the legatee dies before the testator; for the presumption is, that these terms of succession are used to mark the extent of the interest thus intended to be conveyed to the legatee or devisee, and are therefore words of limitation merely.⁸ The language used should point out the *person* or persons who are to take in case of the pre-decease of the legatee, and not merely specify the interest intended to be given. If it does no more than indicate the extent of such interest the legacy will lapse.

§ 571. When a legacy lapses, there being no residuary bequest, it will go to the next of kin as estate undisposed of by will.⁹

⁷ Prescott v. Prescott, 7 Met. 141.

⁸ 2 Redf. Wills, § 8, pl. 4; Dickinson v. Purvis, 8 S. & R. 71.

⁹ Armstrong v. Moran, 1 Bradf. Sur. R. 314.

CHAPTER XLIV.

OF DEVASTAVITS BY EXECUTORS AND ADMINISTRATORS.

§ 572, 573, 574. Defined and remedy stated.

574a. Support of minor heirs — when not a *devastavit*.

§ 572. A *devastavit* is a mismanagement and waste by the personal representative of the estate and effects entrusted to him as such representative, by which a loss occurs. It takes place 1st, by direct abuse, as if he sells, embezzles, or converts to his own use the estate entrusted to him; 2d, by mal-administration, as by the payment of claims which are not owing, or paying others out of the order in which they ought to be paid, or by payment of legacies before all the debts have been satisfied; or 3d, by neglect. The neglect to sell goods in a reasonable time, or, if perishable, before they are wasted, will be deemed a *devastavit*. So will a neglect to collect a doubtful debt, which by proper exertion, might have been collected, will be so considered. And the party who has been guilty of a *devastavit* may be required to make up the loss out of his own estate.¹

§ 573. Where the personal representative, on the sale of property belonging to the estate, received the notes of the purchasers with security, and it resulted that the principals and sureties were insolvent, this was held a *prima facie* neglect of duty by him, and that he was guilty of a *devastavit*.² This would place upon him the burden of showing in defense that the sureties were solvent and of sufficient ability to render the debts secure when the notes were taken.

§ 574. So it is a *devastavit* for the personal representative

¹ Bouv. L. D. and authorities cited.

² Curry v. People, 54 Ill. 263. And it was held in this case that the claimant was not bound to show there were not other assets from which his claim would be ultimately paid.

to loan money of the estate, unless authorized by will, and creditors, legatees and distributees may sue and recover on his bond.³

§ 574a. But in *Johnston v. Maples*, 49 Ill. 401, it was held not to amount to a *devastavit* for an executor to furnish food and clothes for the support of minor heirs, having no guardian, and that he should be allowed to charge a reasonable compensation therefor, until an order of court could be obtained.⁴

CHAPTER XLV.

POWERS OF COUNTY COURTS. — SHERIFFS' DUTIES.

§ 575. General powers of courts under the statute in relation to administration. Laws 1872, 1851.

576. Powers of county courts and clerks. Laws of 1849.

577. Sheriffs' duties, powers and compensation.

§ 575. The general powers of county courts with reference to administration of estates are specified in section 131, as follows:

"County courts shall have power to enforce due observance of all orders, decisions, judgments and decrees made by them in discharge of their duties under this act (title Administration); and they may issue attachments for contempt offered such courts or their process, by any executor, administrator, witness or other person; and may fine or imprison, or either, all such offenders, in like manner as the circuit courts may do in similar cases."

§ 576. By the revised statutes, 1874, title, County Courts, it is provided: § 5. County courts shall have jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlements of

³*Johnston v. Maples*, 49 Ill. 401, and see ante, § 255.

⁴See *Fitzgerald v. Glancy*, 49 Ill. 465.

their accounts, all matters relating to apprentices, * * and in proceedings by executors, administrators, guardians and conservators for the sale of real estate for purposes authorized by law. * * All of which, except as hereinafter provided, shall be considered as probate matters, and be cognizable at the probate terms hereinafter mentioned. § 6. The terms of county court for probate matters shall commence on the third Monday of each month, * * and shall always be open for the granting of letters testamentary and guardianship, and for the transaction of probate business. § 111. The court shall have the power to impanel a jury in any case cognizable at the probate terms, * * whenever it shall be necessary for the trial of any matter pending before the court.

§ 577. Section 132 provides that, "That the sheriff shall, when required by the court, attend all sessions of said court, either by himself or deputy, and shall preserve good order in the court and execute all writs and attachments, summonses, subpoenas, citations, notices and other processes which may, at any time, be legally issued by such court, and make return thereof. And such sheriff shall be entitled to the same fees as he is allowed for similar services in the circuit court."

CHAPTER XLVI.

APPEALS, WRITS OF ERROR AND CERTIORARI.

§ 578. Appeals allowed, and bonds.

579. Bills in chancery better than an appeal in special circumstances.

580. Condition of the bond in case of appeal, writ of error or certiorari.

§ 578. Section 124 provides that, "Appeals shall be allowed from all judgments, orders or decrees of the county court in all matters arising under this act, to the circuit court, in favor of any person who may consider himself aggrieved by any judg-

¹ See Statute Tit. "Fees and Salaries," § 19.

ment, order or decree of such court, and from the circuit court to the supreme court, as in other cases, and bonds with security to be fixed by the county or circuit court, as the case may be."

§ 579. In the case of *Heward v. Slagle*, 52 Ill. 336, there were special circumstances, and the court intimate that a bill in chancery rather than an appeal was the proper remedy for the heirs to take who were dissatisfied with the settlement.

§ 580. And section 125 provides that, "In all cases when an executor or administrator shall take an appeal from the judgment, decree or order of any court or justice of the peace to the county, circuit or supreme court, or when he may prosecute writs of error, or certiorari, the appeal, certiorari or superseas bond shall be conditioned to pay the judgment or decree, with costs, *in due course of administration*; in all other respects such bonds shall be in the form prescribed by law in other cases."

CHAPTER XLVII.

MISCELLANEOUS.

§ 581. Compensation of the personal representative.

582. Account books of decedent subject to inspection.

583. Construction of the statute. Statutory provisions.

584. Suits against heirs and devisees where administration is not begun within a year.

§ 581. Section 133 provides that, "Executors and administrators shall be allowed, as compensation for their services, a sum not exceeding six per centum on the amount of personal estate, and not exceeding three per centum on the money arising from the sale of real estate, with such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same, as shall be reasonable." (As to fees allowed administrators to collect, see ante, § 231.)

An attorney who is an administrator, is not entitled to an al-

lowance against the estate for his professional services. They are regarded as a gratuity.¹

§ 582. Section 128 provides that, "The books of account of any deceased person shall be subject to the inspection of all persons interested therein."

§ 583. Section 134 provides that, "All the provisions in this act relative to an executor shall apply and extend to an executrix or administratrix, or executors or administrators, and *vice versa*, unless otherwise expressly provided for; and whenever the singular number or the masculine gender is mentioned the provisions shall apply to two or more and to the feminine gender, as the case may require, and this act shall be liberally construed, so that its true intent [and meaning] may be fully carried out."

The repealing section, (135) provides that, "This section shall not effect any suits that may be pending or any rights that have accrued when this act shall take effect."

§ 584. The statute, title Frauds and Perjuries, § 11, provides that, "If no person shall administer on the goods and chattels of a deceased person for the space of one year after his or her death, a separate suit or action may be maintained against the heir or heirs, devisee or devisees, on all the contracts and undertakings of such deceased person." The heir or devisee in such cases would be responsible upon such contracts or undertakings to the extent of the assets descended or devised to him. Section 12 provides that, in suits commenced under the foregoing section the facts authorizing the suit to be brought separately against the heir or devisee, shall be distinctly set forth in the declaration.

¹ Willard v. Bassett, 27 Ill. 37.

CHAPTER XLVIII.

GIFTS MORTIS CAUSA.

§ 585. Gift mortis causa defined — its essentials enumerated.

586. It is conditional — intention of donor.

587. How it confers title.

588. Clear proof required to sustain it.

589. No limit to its extent, if creditors are not defrauded. — Not affected by a previous will.

§ 585. Connected occasionally with the collection of the assets of the estate and the allowance of claims in favor of creditors, are questions concerning gifts in prospect of death. Such a gift is often called a gift mortis causa, or a *donatio mortis causa*. It may be defined as a gift of personal property, by a person who is in peril of death, upon condition that it shall presently belong to the donee, in case the owner shall die, but not otherwise.¹

1. It is essential to such a gift that the donor make it in his last illness, or in contemplation and expectation of death. The apprehension of death may arise from infirmity or old age, or from external and anticipated danger.² But the peril need not be such as to indicate speedy dissolution, nor need the condition of the donor be such that he is incapable of making a will.³ The apprehension of death, however, must arise from illness affecting him at the time of making the gift.⁴

2. The gift to operate as a good *donatio mortis causa*, must be made to take effect only in the event of the donor's death, by his existing disorder. A gift to take effect immediately is not such a gift.⁵

¹ 1 Story's Eq. § 606.

² 2 Kent. 444; 3 Redf. Wills, § 42, pl. 5 (1).

³ Nicholas v. Adams, 2 Whart. 17.

⁴ Wms' Ex'rs. 687. As to the proof that the gift was in contemplation of death, see 3 Redf. Wills, § 42, n. 11.

⁵ 3 Redf. Wills, § 42, pl. 5, cl. 2.

3. There must be a delivery of it to the donee, or to some one in trust for him, and possession must continue in the donee or trustee till the death of the donor.⁶ But articles in a store-room or warehouse may be sufficiently delivered by delivering to the donee the key to the room or building in which they are stored.⁷

4. The delivery is insufficient unless the donor parts with all control over the subject of the gift. Authorities are all agreed upon this.

5. Money and bank notes, also notes of private individuals and drafts payable to the donor, and bonds and mortgages, are proper subjects of gift mortis causa, and need not be indorsed or assigned.⁸

6. But the promissory note or other contract of the donor by which he undertakes to pay money, either during his life, or out of his estate after his decease, will not constitute a valid gift mortis causa; neither will his draft or check unaccepted.⁹

7. A deed of personal estate to the wife, the donee having the control and management of it till the donor's death, has been held a good *donatio mortis causa*.¹⁰

8. A person may, by way of *donatio mortis causa*, remit a debt due him, by a surrender of the securities, with a verbal declaration of intention to that effect.¹¹

§ 586. Gifts mortis causa are always conditional, and depend upon the contingency of expected death, and they are defeasible by revocation, or deliverance from the peril. To constitute a good *donatio mortis causa* the circumstances must be such as to show that the donor intended the gift to take effect

⁶ *Ib.* cl. 3.

⁷ *Smith v. Smith*, *Strange*, 955.

⁸ 3 *Redf. Wills*, § 42, pl. 5, cl. 8, 9 and note 37; 2 *Kent*, 447 and notes; *Ib.* 445, n. 2.

⁹ 3 *Redf. Wills*, § 42, pl. 5, cl. 10 and notes; 2 *Kent*, 447.

¹⁰ *Meach v. Meach*, 24 *Vt.* 591. But the reasoning on this point is not very satisfactory. In *Smith v. Downey*, 3 *Ired. Ch.* 268, it was intimated that such a mode of conveyance would not be effectual to create a gift mortis causa, without delivery.

¹¹ 3 *Redf. Wills*, § 42, pl. 10.

if he should die shortly afterwards, but if he should recover, the thing should be restored to him.¹² And the death of the donee during the donor's life operates as a revocation.¹³

§ 587. The donee in this species of gift derives his title directly from the donor, and not in any sense from the personal representative of the donor;¹⁴ and the donation is in no sense of the character of a testamentary gift.¹⁵ A gift mortis causa may be made for a special purpose, and coupled with a trust.¹⁶

§ 588. In order to sustain such a gift, the proof must be clear of the donor's intention to make an absolute gift in contemplation of death, and the burden is necessarily on the donee. The temptations are so many, and the facilities so great for unscrupulous persons to defraud the heirs by means of these gifts, that the question of fact whether a particular gift mortis causa has been made or not, is examined with jealous care.¹⁷

§ 589. There is no limit to the extent of such a gift, provided there is other property of the donor sufficient to satisfy his creditors.¹⁸ And with reference to its effect after his death, it is good notwithstanding a previous will.¹⁹

¹² *Nicholas v. Adams*, 2 Whart. 17; 2 Kent, 444.

¹³ *Walter v. Hodge*, 2 Swanst. 101.

¹⁴ *Gaunt v. Tucker's Ex'rs*, 18 Ala. 27.

¹⁵ 1 Story's Eq. § 606.

¹⁶ *Hills v. Hills*, 8 M. & W. 401; *Blount v. Burrow*, 4 Br. C. C. 72.

¹⁷ *Westerloo v. Dewitt*, 35 Barb. 215.

¹⁸ *Meach v. Meach*, supra; *Chase v. Redding*, 13 Gray, 418; *Mitchell v. Pease*, 7 Cush. 350. But see *Headley v. Kirby*, 18 Penn. 326, where it was held that a gift, in prospect of death, of all the donor's property was invalid.

¹⁹ 2 Kent, 444. It was doubted in *Hambrooke v. Simmons*, 4 Russ. 25, whether *donatio mortis causa* is avoided by making a subsequent will.

FORMS.

Form No. 1.

(See ante, §§ 138, 221.)

PROOF OF DEATH AND PETITION FOR LETTERS TESTAMENTARY.

To the Honorable Judge of the County Court of — County, in the State of Illinois :

The petition of the undersigned, F— B—, respectfully represents that A— B—, late of the county of — aforesaid, departed this life at —, in said county, on or about the — day of —, 18—, leaving a last will and testament, which is herewith presented to your honor for probate. That said will is subscribed by O— S— and E— S—, of —, in said county, as witnesses to the execution thereof.

That said testator in said will nominated and appointed F— B—, your petitioner, executrix thereof, and that your petitioner is willing and ready to accept the office and trust confided to her.

And this petition further shows that the said A— B— died seized and possessed of real* and personal estate consisting chiefly of —, all of said personal estate being estimated to be worth about — dollars. (And if bond by the executor is dispensed with in the will add, and the debts of said estate do not exceed in amount — dollars.)

In consideration whereof, and to the end that said will may be proved, established and performed, your petitioner prays that the subscribing witnesses aforesaid may be summoned to be and appear before this court at such time as the court may direct, then and there to testify in the matter of said will, and that probate of said will may be thereupon granted and the same ordered for record.

And your petitioner further prays that your honor will grant her letters testamentary of said last will and testament, upon her taking the oath prescribed by the statute and entering into bond in such sum and with such securities as may be approved by your honor.

F— B—.

STATE OF ILLINOIS, } ss.
— County.

F— B—, being duly sworn, deposes and says that the facts averred

in the above petition are true, according to the best of her knowledge, information and belief.

F— B—.

Sworn to and subscribed before me, — —, Clerk of the County Court of — county, this — day of —, 18—.

— —, *Clerk.*

See especially as to the allegations of the petition §§ 137, 138, 134. If there is real estate to be disposed of by the executor, its value may be stated after the asterisk in this form.

Form No. 2.

(Ante, §§ 147, 148, 160-167.)

PROOF BY SUBSCRIBING WITNESSES OF THE EXECUTION OF
THE WILL.

STATE OF ILLINOIS, } ss.
— County.

J— C— and R— F—, of —, in the county of —, in the state of —, being duly sworn on their oath say, that they were acquainted with A— B—, the testator in the last will and testament here in court produced (or hereunto annexed), and who is now deceased; that they were present at —, on or about the day of —, 18—, and saw him sign his name to said will (ante, §§ 34-36); or, and that he acknowledged the signature to said will to be his act and deed (§ 148); or, and that the name of said A— B— was signed to said will by said J— C—, in the presence and at the request of said A— B— (§ 164); and that they believed him to be of sound mind and memory at that time; that he was of full age, and that they attested said will in his presence.

J— C—.

R— F—.

Subscribed and sworn to before me (Gro. Stat. 530, § 6); or, in open court, this — day of —, 18—,

— —, *Clerk.*

This form may be varied to suit the facts in each case. If one of the witnesses is dead, or has gone to parts unknown, that fact must be carefully shown, §§ 157, 169, and proof of his having actually signed the will, made by some person who saw him do it, or his handwriting shown by some person who is acquainted with it, and swears that it is his handwriting.

Form No. 3.

(Form of *dedimus potestatem* to take the testimony of a witness who is a non-resident of the county, or state, or unable to attend, ante, § 155.)

DEDIMUS TO PROVE WILL.

STATE OF ILLINOIS, } ss. *In the County Court.*
 — County. }

THE PEOPLE OF THE STATE OF ILLINOIS,

To (this must be directed to a judge, justice of the peace, mayor or other chief magistrate of the city, town, corporation or county where the witness may be found).

Whereas, a writing, purporting to be the last will and testament of ———, deceased, has been produced in said court for probate of the same, upon which will the names of ——— and ——— appear as subscribing witnesses thereto, which said will is hereunto annexed, and it being represented to said court that the said subscribing witness reside at ———, in the county of ———, and state of ———, and without the limits of this state (or county,) and that said witness ——— unable to attend said court.

Now, therefore, we do hereby, in pursuance of the statute in such case made and provided, authorize you, the said ———, to cause the said subscribing witness to come before you, and to take and certify into our said county court the attestation of said witness in due form of law.

Witness ——— County Judge of said ——— County, and the
 [SEAL.] seal of the county court of said ——— county, at ———, in ———
 county aforesaid, this ——— day of ———, A. D. 187 .

———, *County Judge.*

Attest: ———, *Clerk.*

STATE OF ILLINOIS, } ss.
 — County. }

I, ———, a ———, in and for said ———, the person to whom the annexed commission is directed, do hereby certify that on the ——— day of ———, A. D. 187 , ——— and ——— appeared before me in person, who, being by me duly sworn, do depose and say, each for himself, that on the ——— day of ——— A. D. 187 , ——— signed and published the writing annexed hereto, and to said commission, as and for ——— last will and testament, in ——— presence; that the said ——— was of sound mind and memory at the time of so executing said will; that he subscribed ——— name thereto as attesting witness at the request and in the presence of the said testator, and that he was of full age.

———.
 ———.

Sworn to and subscribed before me, the day and year first above written.

Witness my hand and — seal, at —, in said county of —.

— —.

There must be a certificate of the proper officer of official character of commissioner annexed to the papers. This form may be varied to conform to the facts of each case. See Form No. 2.

Form No. 4.

(§ 156.)

OF THE ENTRY TO BE MADE BY THE CLERK OF A CIRCUIT COURT, SHOWING PROOF MADE IN THAT COURT BY A COUNTY JUDGE, WHO IS A WITNESS TO THE EXECUTION OF A WILL.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF A — B —, DECEASED.

And now, to wit: —, 18—, comes F — B —, the executrix appointed as such in and by the last will and testament of A — B —, deceased, by Mr R. her solicitor, and presents the said will, together with her petition to the county court of — county for the probate thereof; and it appearing to the court that W — S —, one of the witnesses to the execution of said will, is at this time judge of the county court of said county, and that his testimony is necessary to the proof of said will; and the said W — S — having appeared in open court, and upon his oath testified as follows (here insert his testimony as in Form No. 2); it is ordered by the court that the proceedings in this cause together with said will and petition be certified by the clerk of this court to the county court of this county.

Form No. 5.

(§§ 135, 216. 217.)

REFUSAL OF A PERSON NAMED AS EXECUTOR TO ACCEPT THE EXECUTORSHIP OF THE WILL.

To the Honorable Judge of the County Court of — County, in the State of Illinois:

The undersigned, named in the will of A — B —, deceased, as executor thereof, does *herewith present the said will to said court, and *respectfully decline to act as such executor. C — H —.

There may be a simple refusal after probate to act, in which case the foregoing form will be sufficient by leaving out the words between the asterisks.

Form No. 6.

(§ 147.)

CLERK'S ENTRY OF THE PROBATE OF WILL AND GRANT
OF LETTERS TESTAMENTARY.

IN THE MATTER OF THE PROBATE OF THE LAST WILL OF A—— B——,
DECEASED, AND THE GRANT OF LETTERS TESTAMENTARY THEREON
TO F—— B——.

And now, to-wit: ——, 18—, comes F—— B——, the executrix named in the last will of A—— B——, deceased, and presents the said will to the court, together with her petition for the probate of the same and for letters testamentary thereon; and it appearing from the allegations of said petition (the same being under the oath of said petitioner), that said A—— B—— departed this life at ——, on the —— day of ——, 18—, leaving said last will, (here set forth all necessary jurisdictional facts,—as, the residence of the deceased, where his real and personal estate are situated, so as to show that the court has jurisdiction of the matter. (See Form No. 1, and §§ 137, 138, 134 and 221, etc.)

And it further appearing to the court from the testimony of J—— C—— and R—— F——, whose names are subscribed to said will, as attesting witnesses to the execution thereof, that they were present on the —— day of ——, 18—, at ——, and saw said A—— B—— sign his name to said will (or as the fact may be), and that they believed him to be of sound mind and memory at that time; that he was of full age, and that they attested said will in his presence. (See Form No. 2). (If the testimony of both witnesses is not alike, the substance of that given by each may be recited. And if one of them is dead that fact may be recited, as well as the proof of his handwriting, etc.) And it satisfactorily appearing to the court that said will was in all respects executed and attested according to law, and that said A—— B——, deceased, was, at the time of the attestation of the same, of sound mind and memory and of full age, (if the will is contested for fraud add,—and no proof of fraud, compulsion or other improper conduct having been exhibited, which in the opinion of the court is sufficient to invalidate or destroy said will). It is ordered and adjudged by the court that the said will be deemed and taken as duly proven, and that the same together with the testimony of the witnesses above named be admitted to record.*

And it further appearing to the court that the said F—— B——, the executrix named in said will, is ready and willing to accept the office and trust therein confided to her, and that the real estate of the testator at the disposal of said executrix is of the value of —— dollars, and the personal estate of said testator is of the value of —— dollars: It is ordered by the

court that she give bond as such executrix, with good security, in the penal sum of — dollars; and the said executrix having made and presented her bond as above ordered, with C— C— and J— C— as sureties, the same is approved by the court and ordered to be filed and recorded; and the said F— B— having also taken the oath required by law to be taken by her as executrix: It is further ordered that letters testamentary upon said will be granted to her.

And it is further ordered by the court that C— K—, J— F— and W— B—, of said county, be and are hereby appointed to appraise the goods, chattels and estate of said A— B—, deceased.

NOTE.—It will be observed that the statute of Willa, § 2, does not require the witnesses to swear that they attested the will in the testator's presence, or that he was of full age, yet it requires that the attestation shall be in his presence; and § 1 requires that he shall be of full age. But those facts being necessary to the validity of the will, I deemed it proper that they appear in the forms. It will also be observed that, § 4 requires non-resident witnesses, whose testimony is taken under a *dedimus potestatem*, to swear that the testator signed and published the will, or acknowledged the execution thereof as his last will and testament, or that some other person signed the testator's name by his direction; that he was of sound mind and memory, and that the witness subscribed his name as witness thereto, *in presence of the testator, and at his request*. This should be recited in the record where the testimony is taken under a *dedimus*. And it will be further observed, that, by § 17, a will or codicil *revoking a former will* or codicil, must be signed by the testator *in presence of two or more witnesses*, and by them attested in his presence; and that nothing is here said about the testator acknowledging his signature, or having his name signed in his presence by another, and by his direction. It is to be regretted that the requirements of the sections alluded to are not uniform.

Form No. 7.

CLERK'S ENTRY WHEN THE TESTATOR DIRECTS IN THE WILL THAT SECURITY BE NOT REQUIRED OF THE EXECUTOR

Proceed as in Form No. 6 to the asterisk, and add:

And the petitioner having taken the oath required by law to be taken by her as executrix of said will, and it appearing to the court that the testator left visible estate more than sufficient to pay all of his debts, and directed in said will that said F— B— be not required to give security as executrix of said will, and the court perceiving no cause from its own knowledge, or the suggestions of creditors or legatees of said A— B— to suspect said F— B— of fraud, or that the personal estate will not be sufficient to discharge all the debts: It is ordered by the court that such security be dispensed with, and that letters testamentary on said will be granted to said F— B—.

Form No. 8.

(§ 223.)

BOND FOR EXECUTORS, AND ADMINISTRATORS WITH WILL ANNEXED.

KNOW ALL MEN BY THESE PRESENTS, That we, — — —, — — — and — — —, of the county of — — and state of Illinois, are held and firmly bound unto the people of the state of Illinois, in the penal sum of — — dollars, current money of the United States, which payment, well and truly to be made and performed, we, and each of us, bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this — day of —, A. D. 18—.

*THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden — — —, — — — and — — —, execut — of the last will and testament of — — —, deceased (or administrator, with the will annexed of — — —, deceased), do make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits, lands, tenements and hereditaments, and the rents and profits issuing out of the same, of the said deceased, which have or shall come to the hands, possession, or knowledge of the said — — —, or into the possession of any other person for — —, and the same so made do exhibit in the county court for the said county of — —, as required by law; and also make and render a fair and just account of — — actings and doings as such execut (or administrator) to said court, when thereunto lawfully required; and to well and truly fulfill the duties enjoined upon — — in and by the said will; and shall, moreover, pay and deliver to the persons entitled thereto all the legacies and bequests contained in said will, so far as the estate of the said testat will thereunto extend, according to the value thereof, and as the law shall charge — —; and shall in general do all other acts which may, from time to time, be required of — — by law, then this obligation to be void, otherwise to remain in full force and virtue.

— — —. [SEAL]

— — —. [SEAL]

— — —. [SEAL]

Form No. 9.

(§§ 138, 222.)

OATH OF EXECUTOR OR ADMINISTRATOR WITH WILL ANNEXED, TO BE ATTACHED TO AND FORM PART OF THE PROBATE OF THE WILL.

STATE OF ILLINOIS, } ss.
 ——— County.

I do solemnly swear — that this writing contains the true last will and testament of the within named A—— B——, deceased, so far as I know or believe, and that I will well and truly execute the same, by paying first the debts and then the legacies mentioned therein, as far as his goods and chattels will thereunto extend, and the law charge me; and that I will make a true and perfect inventory of all such goods and chattels, rights and credits, as may come to my hands or knowledge, belonging to the estate of said deceased, and render a fair and just account of my executorship, when thereunto required by law, to the best of my knowledge and ability: so help me God.

F—— B——.

Subscribed and sworn to before me, this — day of —, A. D. 18—.
 ———, Clerk.

Form No. 10.

(§ 225.)

LETTERS TESTAMENTARY.

STATE OF ILLINOIS, } ss.
 ——— County.

The People of the State of Illinois, to all to whom these Presents shall come,
 GREETING:

KNOW YE, That Whereas, A—— B——, late of the county of — and state of Illinois, died on or about the — day of —, A. D. 18—, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving, at the time of his death, property in this state, which may be lost, destroyed, or diminished in value, if speedy care be not taken of the same; and, inasmuch as it appears that F—— B—— has been appointed executor, in and by the said last will and testament, to execute the same:

And, to the end that said property may be preserved for those who shall appear to have a legal right or interest therein; and that the said will may be executed according to the request of the said testator; we do hereby authorize him the said F—— B——, as such executor, to collect and secure, all and singular, the goods and chattels, rights and credits, which were of the said A—— B—— at the time of his decease, in whose-soever hands or possession the same may be found in this state; and well and truly to perform and fulfill all such duties as may be enjoined upon him by the said will, so far as there shall be property, and the law charge him; and, in general, to do and perform all other acts which now are, or hereafter may be required of him by law.

WITNESS, ———, Clerk of the County Court, of the said
[SEAL.] county of ———, and the seal of said court, this ——— day of
———, A. D. 18—.

———, *Clerk.*

Form No. 11.

(§ 227.)

CLERK'S ENTRY OF ORDER APPOINTING AN ADMINISTRATOR TO COLLECT.

IN THE MATTER OF THE APPOINTMENT OF AN ADMINISTRATOR TO COLLECT AND PRESERVE THE ESTATE OF A—— B——, DECEASED.

Now, to-wit: ———, 18—, it having been made to appear to the satisfaction of the court that great delay will be produced in the administration of the estate of A—— B——, deceased, by reason of the contest pending in relation to the probate of the last will of said A—— B—— (or other cause, see § 227), and that an administrator to collect and preserve said estate ought to be appointed: It is therefore ordered by the court that such administration be committed to G—— C——, upon his taking the oath prescribed by law, and giving bond with good security in the penal sum of ——— dollars. And the said G—— C—— now comes and takes his oath as administrator to collect, and presents his bond for the sum above mentioned, with C—— S—— and R—— F—— as his sureties, which is approved by the court and ordered to be filed and recorded; and thereupon it is further ordered by the court that letters of administration to collect and preserve said estate be issued to said G—— C——.

Form No. 11.

(§ 229.)

OATH OF ADMINISTRATOR TO COLLECT.

STATE OF ILLINOIS, } ss. *In the County Court.*
 — County.

I do solemnly swear (or affirm) that I will well and honestly discharge the trust reposed in me as administrator to collect the estate of A— B—, deceased, according to the tenor and effect of the letters granted to me by the county court of — county, to the best of my knowledge and ability; so help me God.

G— C—.

Subscribed and sworn to before me this — day of —, 18—.

— —, *Clerk.***Form No. 12.**

(§ 223.)

FORM OF BOND OF ADMINISTRATOR TO COLLECT.

The bond is in the same form as that of executors', see Form No. 8, but the condition is as follows:

The condition of the above obligation is such that, if the above bounden G— C— shall well and honestly discharge the duties appertaining to his appointment as administrator, to collect the estate of A— B—, late of the county of —, deceased; shall make, or cause to be made, a true and perfect inventory of all such goods, chattels, debts and credits of the said deceased as shall come to his possession or knowledge, and the same in due time return to the county court of the proper county; and shall also deliver to the person or persons authorized by said county court, as executors or administrators, to receive the same, all such goods, chattels and personal estate as shall come to his possession, as aforesaid, and shall, in general, perform such other duties as shall be required of him by law, then the above obligation to be void: otherwise to remain in full force and virtue.

Form No. 13.

(§ 228.)

LETTERS OF ADMINISTRATION TO COLLECT.

The People of the State of Illinois, to all to whom these presents shall come—
GREETING:

KNOW YE, that whereas A— B—, late of the county of—, and state of Illinois, deceased, as it is said, had at his decease personal property within this state, the administration whereof cannot be immediately granted to the persons by law entitled thereto, but which, if speedy care be not taken, may be lost, destroyed or diminished; to the end, therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize G— C—, of the county of —, and state aforesaid, to collect and secure the said property, wheresoever the same may be in this state, whether it be goods, chattels, debts or credits, and to make or cause to be made a true and perfect inventory thereof, and to exhibit the same with all convenient speed to the county court of the said county of —, together with a reasonable account of his collection, acts and doings in the premises aforesaid.

WITNESS — —, Clerk of the County Court in and for said
[SEAL.] county of —, and the seal of said court, this — day of —,
18—. — —, Clerk.

Form No. 14.

(§§ 234, 235, 137, 141, 237, 239.)

PETITION FOR LETTERS OF ADMINISTRATION.

To the Honorable, Judge of the County Court of — County:

The petition of the undersigned G— C—, respectfully represents that A— B—, late of —, deceased, died at —, in —, on or about the — day of —, A. D. 18—, *leaving property and effects in this county, but left no last will and testament as far as known to and believed by this petitioner. That said deceased left him surviving D— B—, as his widow, and E— B— and F— B—, his only children, and H— B— and R— B— only children of C— B—, deceased, late of — county aforesaid, who was a son of said A— B—, which said children are the only heirs of said A— B—, deceased, and the probable value of per-

sonal property left by the said A—— B——, deceased, is \$2,000, and the probable value of real estate left by him is \$10,000; and your petitioner further says ****that sixty-five days have elapsed since the death of said A—— B——, and that he is a creditor of said estate — therefore he prays that letters of administration be granted to himself as the administrator of said estate.**

G— C—.

STATE OF ILLINOIS, } ss.
— County, }

G—C—, being duly sworn, deposes and says, that the facts averred in the above petition are true, according to the best of — knowledge, information and belief.

G—C —.

Sworn to and subscribed before me — —, this — day of —, 18—. — —, Clerk.

NOTE.—This form may be changed so as to set forth any other facts when they exist, showing the jurisdiction of the court, and the right of the petitioner to have letters, as, if the widow applies, add after the ** that she is the widow as aforesaid of said A—B—, wherefore she prays, etc. If the deceased resided in the county where administration is sought, the foregoing form is sufficient. If he was a non-resident of the state and left lands there, after the asterisk say,—leaving lands in this county. And if he left only personal property, say,—leaving only personal property, of which a part—or the whole, according to the fact—was and is in this county. So if he had no known place of residence and no lands in this state, the last form will be sufficient. See § 234.

Form No. 15.

(§§ 240, 234-240.)

RELINQUISHMENT OF RIGHT TO ADMINISTER.

STATE OF ILLINOIS, } ss.
— County.

To the Honorable, Judge of the County Court of said County:

I, C— B—, widow (or son or other next of kin or a creditor) of A— B—, late of said county, deceased, do hereby relinquish all right which I may have to administer as such widow (or next of kin, etc.), upon the estate of the said deceased.

Witness my hand, this — day of —, A. D. 18—.

C—B—.

Form No. 16.

(§§ 240, 234.)

CLERK'S ENTRY OF THE APPOINTMENT OF AN ADMINISTRATOR.

IN THE MATTER OF THE APPOINTMENT OF AN ADMINISTRATOR OF THE ESTATE OF A— B—, DECEASED.

This day, to wit: —, 18—, came G— C—, and filed his petition for letters of administration of the estate of A— B—, deceased, together with the relinquishment, in writing, of C— B—, widow, and F— B— and E— B—, only children of said A— B—, deceased, of their right to administer upon said estate, and it appearing to the satisfaction of the court, that said A— B— died at —, in — county, Illinois, on or about the — day of —, 18—, intestate, leaving personal property in this county (see § 234) of the value of — dollars, and also leaving C— B—, as his widow, and F— B— and E— B— his only children, and that they have relinquished their right of administration of said estate; and it further appearing to the satisfaction of the court that said G— C— is a creditor of said estate, and there appearing to be no legal objection to his appointment as administrator: It is ordered by the court that the said G— C— be appointed administrator of the estate of said A— B—, deceased, and that he take the usual oath provided by law, and give bond as such administrator, with good security, in the penal sum of — dollars. And the said G— C— having taken the oath aforesaid, and presented his bond in said sum, with C— P— and A— S— as securities, it is ordered by the court that said bond be approved, filed and recorded, and that letters of administration on said estate be issued to him.

Appoint appraisers as in Form No. 6.

NOTE.—If the intestate resided in the county where administration is sought, the foregoing form is sufficient. If he was a non-resident of the state, and left only lands, the fact of his non-residence should appear, and it may be stated after the date of his death, thus,—that he was a non-resident of this state; and the fact of his leaving real property in the county may be stated (see § 234) by inserting the word "real" after the word "leaving." If he left personal property in this state its value should be stated, as the amount of the administrator's bond will be regulated by that value. If he left only land, the court should in some way be advised of the debts and value of the land in order to fix the amount of the bond, which should be double the amount of the debts, if the land is sufficient to pay them; if the land is not sufficient to pay the debts, then the bond should be double the value of the land.

Form No. 17.

(§ 241.)

ADMINISTRATOR'S OATH.

STATE OF ILLINOIS, } ss.
 — *County.*

In the County Court.

I do solemnly swear (or affirm) that I will well and truly administer all and singular the goods and chattels, rights, credits and effects of A — B —, deceased, and pay all just claims and charges against his estate, so far as his goods, chattels and effects shall extend, and the law charge me; and that I will do and perform all other acts required of me by law, to the best of my knowledge and abilities.

G — C —

Subscribed and sworn to before me this — day of —, 18 .

— —, Clerk.

Form No. 18.

(§ 242.)

ADMINISTRATOR'S BOND

Proceed as in Form No. 8, to the asterisk.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said G — C —, administrator of all and singular the goods and chattels, rights and credits of A — B —, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased which shall come to the hands, possession or knowledge of him, the said G — C —, as such administrator or to the hands of any person or persons for him; and the same so made, do exhibit, or cause to be exhibited, in the county court for the said county of —, agreeably to law, and such goods and chattels, rights and credits, do well and truly administer, according to law, and all the rest of said goods and chattels, rights and credits, which shall be found remaining upon the accounts of the said administrator, the same being first examined and allowed by the county court, shall deliver and pay unto such person or persons respectively, as may be legally entitled thereto, and further, do make a just and true account of all his actings and doings therein, when thereunto required by the said court; and, if it shall appear that any last will and testament was made by the deceased, and the same be proved in court, and letters testamentary or of adminis-

tration be obtained thereon, and the said G — C — do in such case, on being required thereto, render and deliver up the letters of administration granted to him as aforesaid, and shall in general do and perform all other acts which may at any time be required of him by law, then this obligation to be void, otherwise to remain in full force and virtue.

— — —. [SEAL]

— — —. [SEAL]

— — —. [SEAL]

Attest: F — C —, *Clerk.*

Form No. 19.

(§§ 235, 239.)

LETTERS OF ADMINISTRATION.

STATE OF ILLINOIS, }
 — County. } ss.

The People of the State of Illinois, to all to whom these Presents shall come,
GREETING:

KNOW YE, That whereas A — B —, of the county of — and state of Illinois, died intestate, as it is said, on or about the — day of —, A. D. 18—, having at the time of his decease, personal property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; to the end, therefore, that said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint G — C —, of the county of — and state of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said A — B — at the time of his decease; with full power and authority to secure the said property and debts, wheresoever the same may be found in this state, and in general to do and perform all other acts which now are, or hereafter may be required of him by law.

WITNESS, — —, Clerk of the County court of the said County
 [SEAL] of —, and the seal of the said court, this — day of —,
 A. D. 18—.

— —, *Clerk.*

NOTE.—The statute, Tit. Admin. § 21, provides that, the form of letters of administration shall be as near as may be as above given; and that in all cases where letters of administration *de bonis non*, or to a public administrator are issued, they shall be in conformity with the foregoing form, as nearly as may be, taking care to make the necessary variations, additions or omissions to suit each particular case.

Form No. 20.

(§ 247.)

OFFICIAL OATH OF PUBLIC ADMINISTRATOR.

STATE OF ILLINOIS, }
 ——— County. }

I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of public administrator of ——— county, according to the best of my ability.

A—— C——.

Subscribed and sworn to before me, this ——— day of ———, 18——.
 ——— ———, *Clerk.*

NOTE.—The statute does not expressly provide that a public administrator shall take an oath, when appointed to administer upon an estate, still it would be proper to require it; in which case Form No. 17 should be adopted.

Form No. 21.

(§§ 247, 248, 234-237. Stat. § 46.)

PETITION BY A CREDITOR FOR LETTERS OF ADMINISTRATION TO BE GRANTED TO THE PUBLIC ADMINISTRATOR.

Proceed as in Form No. 14, to the asterisk, then add:

— seized (or possessed of, or having right to, or interest in) *real estate* lying within the county of ——— (where the application for letters is made), in the state of Illinois, to-wit: (here describe it, § 248). That he left no last will or codicil so far as known to, or believed by the petitioner. That said A—— B—— left him surviving C—— B——, as his widow, and F—— B—— and E—— B——, his only children and heirs, all of whom reside in the city of ———, in the state of ———. That one C—— P—— is, as the petitioner is informed and believes, the only creditor of said A—— B——, except the petitioner, within this state, but has relinquished his right to administer upon the estate of said A—— B——, which relinquishment is in writing and filed herewith. That the petitioner is a creditor of said A—— B—— in the sum of about ——— dollars, on a verbal contract for goods sold to him within the last five years (or on his promissory note — describing it, § 247, or any other fact showing that the petitioner is "interested" in the estate). That the real estate of said deceased within this

state, so far as known to or believed by the petitioner, is of the value of — dollars. And the petitioner not being willing to administer upon the estate of A— B—, prays that the court will grant letters of administration upon said estate to the public administrator of said county of —.

Subscribed and sworn, etc.

Where the intestate is a non-resident, or without a widow, next of kin or creditors in his state, but leaves property within this state, administration must be granted to the public administrator of the proper county. See § 18, Tit., Administration. The aim of this clause was to provide for those cases where *personal* estate was left in Illinois, and there was no person in the state having an interest, as widow, next of kin or creditors, in preserving it,—a very different case from the one presented by section 46, which applies only in cases where there are creditors here, who, under other provisions of the statute, have a right to be appointed as administrator.

FORM OF PETITION BY THE PUBLIC ADMINISTRATOR FOR
LETTERS OF ADMINISTRATION ON THE ESTATE OF
ONE WHO IS A NON-RESIDENT, OR WITHOUT A WIDOW,
NEXT OF KIN OR CREDITORS IN THIS STATE.

Proceed as in Form No. 14, to the asterisk, then add:

leaving real estate (if any, in which case describe it, so as to show the jurisdiction of the court, which will be in the county where the intestate resided, if in this state; and if not, where the major part of his personal property is situated), *and also*, personal property, the major part of which was, at the time of his death, and now is, in the county of —. That he left no last will or codicil so far as known to or believed by the petitioner; that said A— B— left no widow, next of kin (which includes only such as are entitled to inherit from the deceased) or creditors in this state. That the real estate of said deceased, so far as known to the petitioner, is of the value of about — dollars, and his personal estate within this state of the value of about — dollars. And that the petitioner is public administrator of said county of —; wherefore he prays that letters of administration may be granted to him as public administrator of said county, upon the said estate of A— B—.

Subscribed and sworn, etc.

Form No. 22.

(\$ 251.)

NOTICE BY PUBLIC ADMINISTRATOR, WHERE BALANCE OF
ESTATE REMAINS FOR TWO YEARS.

PUBLIC ADMINISTRATOR'S NOTICE. ESTATE OF A— B—, DECEASED.

Public notice is hereby given, that there is now remaining in my hands — dollars, belonging to the estate of A— B—, who died at — in the county of —, and state of Illinois, on the — day of —, 18—, which amount so remaining in my hands is the balance, after payment of all just debts and charges against said estate which came to the knowledge of the undersigned within two years after the administration of said estate was committed to me. And all persons having claims or demands against said estate are hereby notified to exhibit the same, together with the evidence in support thereof, before the county court of — county, in the state of Illinois, within six months after the date of this notice, or the same will be forever barred.

Dated at —, this — day of —, 18—.

Sw.

O— M—, *Pub. Adm.**Form No. 23.*

(\$§ 253, 255, 256, 257. General Form.)

PETITION FOR REVOCATION OF LETTERS TESTAMENTARY
OR OF ADMINISTRATION.*To the Honorable Judge of the County Court of — County:*

The petition of the undersigned respectfully represents that he is a son (or a creditor), of A— B—, deceased; that on the — day of —, 18—, letters of administration were granted by said court to G— C—, upon the estate of said A— B—, deceased; *that said letters were so granted to said G— C— upon the pretense that he, the said G— C— was a creditor of said estate (or other false and fraudulent pretense, according to the fact), which pretense the petitioner avers was false and fraudulent. Wherefore the petitioner prays that said G— C— may be summoned to appear before this court to show cause, if any he has, why his letters of administration aforesaid shall not be revoked, and that upon the hearing thereof said letters may be revoked.

R— P—.

Subscribed and sworn, etc.

Form No. 24.

(§ 255.)

PETITION FOR REVOCATION OF LETTERS WHERE THE EXECUTOR OR ADMINISTRATOR BECOMES INSANE, OF UNSOUND MIND, AN HABITUAL DRUNKARD, CONVICTED OF INFAMOUS CRIME, WASTES OR MISMANAGES THE ESTATE OR CONDUCTS HIMSELF SO AS TO ENDANGER HIS CO-EXECUTOR OR CO-ADMINISTRATOR OR SECURITIES.

Proceed as in Form No. 23 to the asterisk, except the fact of being an heir, legatee or creditor, then add:

(or, letters testamentary were granted by said court to G—— C—— upon the will of A—— B——, deceased); that since that time the said G—— C—— has become and now is insane (or of unsound mind, or an habitual drunkard, or has become convicted of an infamous crime, to-wit: burglary, or other cause, naming it, and stating the facts from which danger to securities, etc. may be predicated). Wherefore, the petitioner prays that the said G—— C—— may be summoned to appear before this court to show cause why said letters should not be revoked.

R—— P——.

Subscribed and sworn, etc.

Form No. 25.

(§ 253a.)

AFFIDAVIT BY A PERSON INTERESTED, THAT AN EXECUTOR OR ADMINISTRATOR, HAS REMOVED OR IS ABOUT TO REMOVE WITHOUT THE LIMITS OF THE STATE.

STATE OF ILLINOIS, } ss. *In the County Court.*
 — County.

E—— F——, of said county, being duly sworn, on his oath says, that he is interested in the estate of A—— B——, deceased, being a creditor thereof (or distributee or legatee, etc.), and that G—— C——, executor of the last will and testament of said A—— B—— (or administrator of the estate of, etc.), has removed (or is about to remove) without the limits of this state.

E—— F——.

Subscribed, etc.

Form No. 25 1-2.

(§ 258a.)

NOTICE TO EXECUTOR OR ADMINISTRATOR WHO HAS REMOVED OUT OF THE STATE, TO APPEAR AND MAKE SETTLEMENT OF HIS ACCOUNTS.

ESTATE OF A — B —, DECEASED.

*In the County Court of — County.**To G — C —, executor of the last will of A — B —, deceased (or administrator of the estate, etc.):*

Satisfactory affidavit having been filed, that you have removed without the state of Illinois, you are hereby notified to appear before the county court of — county, in said state, within thirty days after the date of this notice, and make a settlement of your accounts as required by law; and that in default thereof you will be removed from your office as executor (or administrator).

Dated at —, this — day of —, 18—.

4w.

E — F —, *Clerk.***Form No. 26.**

(§ 250.)

PETITION BY A PERSON ENTITLED TO DISTRIBUTION OR OTHERWISE INTERESTED IN THE ESTATE, TO REQUIRE THE EXECUTOR OR ADMINISTRATOR TO GIVE OTHER AND SUFFICIENT SECURITY, WHERE THE SECURITY IS INSUFFICIENT.*To the Honorable Judge of the County Court of — County:*

The petition of the undersigned respectfully represents that he is a son (or legatee, according to the fact) of A — B —, deceased; that on the — day of —, 18—, G — C — was appointed by said court executor of the last will, etc. (or administrator of the estate of, etc.),* and that H — C —, the surety on the executor's (or administrator's) bond of said G — C — has become insufficient (or is insufficient), so that the interests of persons entitled to distribution and otherwise interested in the estate of said — are insecure; wherefore the petitioner prays that said executor (or administrator) may be summoned to appear before this court,

and be required to give other and sufficient security as such executor (or administrator).

Subscribed etc.

D— B—.

Form No. 27.

(§ 280.)

**PETITION BY SECURITY OF EXECUTOR OR ADMINISTRATOR
TO COMPEL HIM TO GIVE COUNTER SECURITY OR NEW
BOND.**

To the Honorable Judge of the County Court of — County :

The petition of the undersigned respectfully represents, that, on the — day of —, 18—, G— C— was appointed by this court executor of the last will of A— B—, deceased (or administrator of the estate of A— B—, deceased), and that the petitioner became surety upon the bond of said G— C—, as such executor (or administrator), *and that he conceives himself in danger of suffering by the mismanagement of said estate by said G— C—, and for cause of such apprehension says (here set forth the cause or causes out of which the danger arises). Wherefore the petitioner prays that said G— C— may be summoned to answer this petition, and to show cause why he should not give good counter security to save the petitioner harmless, or a new bond.

R— P—.

Subscribed and sworn, etc.

Form No. 28.

(§ 261.)

**FORM OF BOND WHEN ADDITIONAL SECURITY OR NEW
BOND IS REQUIRED BY THE COURT, UPON PETITION OF
A PERSON INTERESTED, OR A SURETY.**

The bond is the same as in No. 9, and the condition as follows:

The condition of the above obligation is such, that whereas, the above bounden G— C—, executor of the last will and testament of A— B—, deceased (or administrator of the goods and chattels, rights and credits of A— B—, deceased), has heretofore executed a bond, payable to the people of the state of Illinois, and for the discharge of his duties as

executor (or administrator), as aforesaid, which said bond bears date on the — day of —, A. D. 18—; and whereas, by an order of the county court, made on the — day of —, A. D. 18—, other bond and security has been required of the said executor (or administrator): Now, therefore, if the said executor (or administrator) shall well and truly have kept and performed, and shall well and truly keep and perform the conditions of the bond first given, as aforesaid, in all respects according to law, and shall in all respects have performed, and shall continue to perform the duties of his office, as aforesaid, then this obligation to be void: otherwise, to remain in full force and virtue.

Form No. 29.

(§ 263.)

PETITION BY SURETY OF AN EXECUTOR OR ADMINISTRATOR TO BE RELEASED FROM FURTHER LIABILITY ON THE BOND.

Proceed as in Form No. 27 to the asterisk, then add:

And the petitioner further represents that he desires to be released from further liability upon said bond. Wherefore he prays that the said court will direct what notice shall be given thereof to said executor (or administrator) and compel him, the said executor (or administrator), within a reasonable time to settle and adjust his accounts, and pay over whatever balance shall be found in his hands, and file a new bond as required by law in such cases.

C— P—.

Form No. 30.

(§ 268.)

PETITION BY EXECUTOR OR ADMINISTRATOR, FOR LEAVE TO RESIGN.

To the Honorable Judge of the County Court of — County.

The petition of the undersigned respectfully represents, that on the — day of —, 18—, he was appointed by said court executor of the last will of A— B—, deceased (or administrator), of the estate of A— B—

deceased, and that he is desirous of resigning his trust as such executor (or administrator). Wherefore the petitioner prays that the said court will direct what notice thereof shall be given to the legatees, devisees and distributees (or in case of administration, to the *distributees*), and that he may be allowed to resign his trust aforesaid.

G — C —, *Executor, etc.*

NOTE.—The notice in such cases may be enclosed in a letter addressed and mailed to each party a reasonable time before the resignation should be allowed. But if their residence or names be unknown, it would be proper to require that the notice be published in a newspaper,

Form No. 31.

(§§ 253, 255, 258.)

CLERK'S ENTRY OF AN ORDER OF REVOCATION OF LETTERS TESTAMENTARY OR OF ADMINISTRATION.

IN THE MATTER OF THE PETITION OF R — P —, FOR REVOCATION OF LETTERS OF ADMINISTRATION GRANTED TO G — C —, UPON THE ESTATE OF A — B —, DECEASED.

And now, to wit: —, 18 —, comes R — P —, the petitioner, and the said G — C —, administrator of the estate of A — B —, deceased, and this cause coming on to be heard upon the petition, and the testimony of witnesses sworn and examined in open court, and it appearing to the satisfaction of the court that the said petitioner is a creditor of said estate (or son of said A — B —), and that the letters of administration of the estate of A — B —, deceased, heretofore granted by this court to said G — C —, were granted to him upon the false and fraudulent representation that he was a creditor of said estate (or other false and fraudulent pretense): It is ordered by the court that the said letters of administration upon the estate of said A — B —, heretofore granted by this court to said G — C —, be revoked, and that said G — C — pay the costs of this suit.

Form No. 32.

(§ 255.)

CLERK'S ENTRY OF ORDER OF REVOCATION OF LETTERS,
WHERE THE EXECUTOR OR ADMINISTRATOR HAS BE-
COME INSANE, ETC.

IN THE MATTER OF THE PETITION OF R — P —, FOR REVOCATION
OF LETTERS TESTAMENTARY GRANTED TO G — C —, AS EXECU-
TOR, OF THE LAST WILL OF A — B —, DECEASED (OR LETTERS OF
ADMINISTRATION UPON THE ESTATE, ETC).

And now, to wit: —, 18 —, comes R — P —, the petitioner, and
it appearing to the court that the said G — C — has been duly served
with summons in this cause according to law, and the said G — C —
having failed to appear and show cause why the letters testamentary here-
tofore granted to him by this court, as executor of the last will of A —
B —, deceased, should not be revoked; and this cause now coming on
to be heard upon the petition and the testimony of witnesses sworn and
examined in open court; and it appearing to the satisfaction of the court
that the said G — C —, since the said letters testamentary were granted
to him, has become and now is insane: It is ordered by the court, that
the said letters be revoked.

This form can be easily varied to suit any case arising under § 255.

Form No. 33.

(§ 259.)

CLERK'S ENTRY OF ORDER FOR THE EXECUTOR OR AD-
MINISTRATOR TO GIVE A NEW BOND.

IN THE MATTER OF THE PETITION OF R — P —, FOR AN ORDER REQUIR-
ING G — C —, ADMINISTRATOR OF THE ESTATE OF A — B —
DECEASED TO GIVE OTHER AND SUFFICIENT SECURITY.

And now, to wit: —, 18—, comes the said petitioner, R — P —, and
said G — C —, Administrator of the estate of A — B —, deceased,
and this cause coming on to be heard upon the petition and the testimony
of witnesses sworn and examined in open court, as well on the part of
the petitioner as of the said administrator, and it appearing to the satis-

faction of the court that the petitioner is a creditor of the estate of said A—— B——, deceased (or in some other way interested therein), and that the security taken on the bond of said administrator is insufficient: It is ordered by the court that said G—— C——, as administrator as aforesaid, give other bond in the sum of — dollars, with sufficient security, within — days from the date of this order. And thereupon the said G—— C——, made and filed his bond as aforesaid in the sum of — dollars, with K—— S—— and S—— C——, as sureties, which is approved by the court and ordered to be filed and recorded.

This form may be easily changed to apply to cases under § 260.

Form No. 34.

(§272.)

INVENTORY.

STATE OF ILLINOIS, } ss.
— County. }

IN THE MATTER OF THE ESTATE OF A—— B——, DECEASED.

The following is a full and perfect inventory of all the real and personal estate of the said deceased, so far as the same has come to the possession or knowledge of the undersigned administrator of said estate (or executor of the last will of A—— B——, deceased):

Real Estate.

1. The southeast quarter of section 34, in township 15 north, range 5 east of the fourth principal meridian, lying in — county, Illinois, 160 acres. Title, fee simple, believed to be perfect, but subject to a mortgage of the deceased in favor of J—— S——, dated —, 18—, for — dollars and interest at ten per cent. Occupied by the family of the deceased as a homestead. (§ 272.)

2. The west half of the southwest quarter of section 35, in township 15 north, range 5 east of the fourth principal meridian, lying in said county, and state, 80 acres. Occupied by the family of the deceased, and held by said deceased under a lease from J—— B—— to him, for and during the life of O—— C——, who is now living. Date of lease, ——. Rent, \$250 per year, payable at the end of the year. (§ 284.)

3. The northeast quarter of the northeast quarter of section 36, in township 15 north, range 5 east of the fourth principal meridian, lying in said county and state, 40 acres. Title, fee simple, and supposed to be per-

fect. This tract was leased by the deceased to R— C—, on the — day of —, 18—, for the term of five years from that date. Rent reserved \$30 per quarter, payable at the end of each quarter after the date. (§ 292.)

Chattel Property.

Lease of the east half of southwest quarter of section 35, township 15 north, range 5 east of the fourth principal meridian, lying in — county, Illinois, from J— W—, dated —, 18—, for the term of ninety-nine years from date. Rent, \$225 per year payable annually, and also taxes and repairs. Occupied by the family of deceased. (§§ 284, 292.)

(Here specify any other personal property, giving the number of articles of each kind in the left hand column; but the statute does not require any estimate of value. And it is advisable, for convenience of reference, that all articles of similar character be inventoried together, as horses, oxen, cows, hogs, agricultural implements and tools, grain, etc. This will insure greater accuracy, and aid the appraisers in their duties. They would also do well to follow the order of the inventory in this respect. The sale bill should follow the same order. This arrangement of the items in these bills will enable persons interested to see if all the articles have been inventoried, appraised and sold, as well as aid in ferreting out negligence or dishonesty in the personal representative.)

Cash on hand at decease..... \$142 25

Notes — Deemed Good.

From M— S—, dated —, 18—, amount \$200, interest 10 per cent., payable annually, due 2 years after date. Interest for one year paid. Amount due..... 245 50

Notes — Deemed Doubtful.

From C— W—, dated —, 18—; amount, \$180, interest, 6 per cent. Due one year after date. Amount due 206 30

(The statute does not require that the amount of the interest due shall be stated in the inventory; and it is a sound practice, approved by many judges, not to require it, but to have the inventory show the date and amount of the note, with the rate of interest, and the date and amount of payments endorsed thereon. From these facts the amount chargeable to the personal representative can be easily computed whenever necessary.)

Accounts — Deemed Good.

F— C— 105 00
R— S— 75 00

Accounts — Deemed Doubtful.

A— S— 153 00
C— W— 50 00

I do hereby certify that the above is a correct inventory of the real and personal estate of A— B—, deceased.

Given under my hand, this — day of —, 18—.

G— C—.

Form No. 35.

(§ 313.)

WARRANT TO APPRAISERS.

STATE OF ILLINOIS, }
— County. } ss.

In County Court.

The People of the State of Illinois, to C— P—, R— H— and B— F—, of the County of —, and State of Illinois, GREETING:

This is to authorize you, jointly, to appraise the goods, chattels and personal estate of A— B—, late of the county of —, and state of Illinois, deceased, so far as the same shall come to your sight and knowledge, each of you having first taken the oath hereto annexed; a certificate whereof you are to return, annexed to an appraisement bill of said goods, chattels and personal estate, by you appraised in dollars and cents; and in the said bill of appraisement you are to set down in a column or columns, opposite to each article appraised, the value thereof.

WITNESS, C— C—, Clerk of the County Court of —
[SEAL.] county, and the seal of said court, this — day of —,
18—.

C— C— Clerk.

Form No. 36.

(§ 313.)

OATH OF APPRAISERS.

STATE OF ILLINOIS, }
— County. } ss.

We, and each of us, do solemnly swear, that we will well and truly, without partiality or prejudice, value and appraise the goods, chattels and personal estate of — —, deceased, so far as the same shall come to our sight and knowledge; and that we will in all respects perform our duties as appraisers, to the best of our skill and judgment.

C— P—.

R— H—.

B— F—.

Subscribed and sworn to, this — day of —, A. D. 18—, before me.
 ———, *Justice of the Peace.*

This may be sworn before any person authorized to administer an oath. Stat. Tit. Admin. § 54.

Form No. 37.

(§§ 313, 315.)

APPRAISEMENT BILL.

STATE OF ILLINOIS, } ss. *In County Court.*
 ——— County.

An appraisement bill of the goods, chattels and personal estate of A——
 B——, deceased, made by virtue of the annexed warrant. (Form No. 35.)

ARTICLES.	VALUE.
.....	\$....
(See comments on Form No. 34.)	
.....	
Total	

The undersigned, appointed by County Court of said county, to appraise the goods, chattels and personal estate of A—— B——, late of said county; deceased, do hereby certify that the foregoing is a true and correct appraisement bill of said goods, chattels and personal estate, so far as the same have come to our sight and knowledge; that we have appraised each article at its true value according to the best of our skill and judgment, having first taken the oath required by law.

Given under our hands and seals this — day of —, A. D. 18—.

C—— P——, [SEAL] }
 R—— H——, [SEAL] } *Appraisers.*
 B—— F——, [SEAL] }

We, the appraisers above named, do certify that we have attended and served — day each, in appraising the estate of said deceased.

C—— P——, }
 R—— H——, } *Appraisers.*
 B—— F——, }

Form No 38.

(§§ 315, 317, 318, 319.)

WIDOW'S AWARD, OR APPRAISERS' ESTIMATE OF THE
VALUE OF PROPERTY ALLOWED TO THE WIDOW.

The undersigned, appraisers appointed by the County Court of — county to appraise the goods, chattels and personal estate of A— B—, deceased, do hereby make and certify to said court the following estimate of the value of each article of specific property allowed by law to the widow, for herself and family, to-wit:

ITEMS.	DOLLS.	Cts
The family pictures and the wearing apparel, jewels and ornaments of the widow and minor children.....		
School books and family library ..	100	00
One sewing machine		
Necessary beds, bedsteads and bedding for widow and family		
¹ The stoves and pipe used in the family, with the necessary cooking utensils.....		
Household and kitchen furniture.....	100	00
— milch cow and cal (being one for every four members of the family)		
— sheep and fleeces (being two for each member of the family)		
One horse, saddle and bridle.....		
Provision for widow and family for one year		
Food for the stock above specified for six months.....		
Fuel for the widow and family for three months.....		
² Other property.....	100	00
Total		

Given under our hands.

C—	P—,	} <i>Appraisers.</i>
R—	H—,	
B—	F—,	

This form is generally attached to the appraisement bill

¹ Where there are no stoves, etc., allow fifty dollars.² Suited to the condition in life of the widow, to be by her selected.

Form No. 39.

(\$ 322, 325.)

WIDOW'S RELINQUISHMENT AND SELECTION.

STATE OF ILLINOIS, } ss.
 County of ——. }

I, F— B—, widow of A— B—, deceased, do hereby relinquish all my claim to the following articles mentioned in the "Appraisers' estimate of specific property," allowed me for myself and family, to wit:

ITEMS.	DOLLS.	CTS.
The family pictures and the wearing apparel, jewels and ornaments of the widow and minor children		
School books and family library	\$100.	00
One sewing machine		
Necessary beds, bedsteads and bedding for widow and family		
The stove and pipe used in the family, with the necessary cooking utensils		
Household and kitchen furniture	100	00
— milch cow and cal (being one for every four members of the family)		
— sheep and fleeces (being two for each member of the family)		
One horse, saddle and bridle		
Provisions for widow and family for one year		
Food for the stock above specified for six months		
Fuel for the widow and family for three months		
Other property	100	00
Total		

The aggregate value of which, as estimated, is \$—; and in lieu of the same I desire to retain the following articles named in the "Appraisement Bill of Personal Property" of said A— B—, deceased, viz.:

ARTICLES.	VALUE.	
	DOLLS.	CTS.
.....		
.....		

The total value of which, as appraised, is \$— dollars, and the balance (\$—), I prefer to have in money.

Witness my hand, this — day of —, A. D. 18—.

F— B—.

NOTE.—The statute Tit. Admin. § 74, last clause, provides that, the widow may, if she so elects, take and receive in lieu of her award, the same personal property, or money in place thereof, as is or may be exempt from execution or attachment against the head of a family residing with the same. But, as the exemption is now so much smaller than the amount allowed by appraisers, and has in no respect any advantages over the award, it will be unnecessary to notice it any further.

Form No. 40.

(§§ 327, 327a.)

REPORT OF PERSONAL REPRESENTATIVE THAT THE PERSONAL PROPERTY AND ASSETS DO NOT EXCEED THE AMOUNT OF THE WIDOW'S AWARD AND NECESSARY EXPENSES.

To the Honorable Judge of the County Court of — County :

The undersigned, administrator of the estate of A— B—, deceased, to whom letters of administration were heretofore granted by this court, respectfully reports unto your Honor, that, he has made and filed in this court an inventory and appraisal bill of the personal property and assets of said estate, and that the same amount in value to the sum of — dollars; that the value of the property awarded to F— B—, as widow of said A— B—, is — dollars, and the necessary expenses incurred in administering upon said estate have been — dollars. And because the said property and assets do not exceed the amount of said widow's award, after deducting the necessary expenses incurred, the undersigned prays that the court will make an order directing him to deliver all of said property and assets to said widow, which shall remain after the payment of the necessary expenses incurred in the administration of said estate, and discharge him from further duty in the premises.

G— C—, *Admr.*

Form No. 41.

(§§ 327, 327a.)

**CLERK'S ENTRY OF ORDER FOR THE ADMINISTRATOR TO
DELIVER PERSONAL PROPERTY AND ASSETS OF THE
ESTATE TO THE WIDOW.**

IN THE MATTER OF THE APPLICATION OF G—— C——, ADMINISTRATOR
OF THE ESTATE OF A—— B——, DECEASED, FOR AN ORDER DI-
RECTING HIM TO DELIVER TO THE WIDOW OF THE DECEASED THE
PERSONAL PROPERTY AND ASSETS OF SAID ESTATE.

And now, to-wit: —, 18—, comes G—— C——, administrator of the estate of A—— B——, deceased, and presents his report showing that the personal property and assets of said estate do not exceed the amount of the award made to F—— B——, widow of said A—— B——, after deducting the necessary expenses incurred in administering upon said estate, and praying the court to make an order directing him to deliver all of said property and assets to said widow, which shall remain after the payment of the necessary expenses incurred in the administration of said estate, and to discharge him from further duty in the premises; and the court having examined said report, and being satisfied that the same is in all respects correct and true: It is ordered by the court that said administrator first pay out of said property and assets the costs and expenses of administration, and deliver to said widow the remainder of said property and assets, and take her receipt therefor, and report his proceedings in this behalf to this court; and it is further ordered that he be thereupon discharged from further duty as such administrator.

Form No. 42.

(§§ 328, 335.)

PETITION TO SELL PERSONAL PROPERTY.

To the Honorable Judge of the County Court of — County:

The undersigned, G—— C——, heretofore appointed by this court administrator of the estate of A—— B——, deceased, respectfully represents that he has returned to this court the inventory and appraisement of the personal estate of said deceased; that he believes that the ready money of said estate is not sufficient to pay the debts against said estate; that

the personal estate of all kinds amounts to — dollars, and the debts against said estate, the widow's award and the costs of administration will amount, as he is advised and believes, to — dollars, and that a sale of all the personal property, goods and chattels of said estate not awarded to the widow, or selected and taken by her, is therefore necessary for the proper administration of said estate (and if it is desirable that the sale be private, add, and that it will be for the best interest of the estate that they be sold at private sale).

Your petitioner therefore prays for an order to sell all of the personal property, goods and chattels contained in the inventory and appraisement bill of said estate, except what may be lawfully reserved to the widow, at public (or private) sale, and on such terms as the court shall direct.

G— C—, *Administrator*.

NOTE.—This form may be varied to suit the requirements of each particular case.

Form No. 43.

(§§ 338, 335.)

CLERK'S ENTRY OF AN ORDER DIRECTING THE PERSONAL REPRESENTATIVE TO SELL THE PERSONAL PROPERTY.

IN THE MATTER OF THE APPLICATION OF G— C—, ADMINISTRATOR OF THE ESTATE OF A— B—, DECEASED, FOR AN ORDER TO SELL THE PERSONAL PROPERTY, ETC., OF SAID ESTATE.

This day comes G— C—, administrator of the estate of A— B—, deceased, and presents his petition for an order directing him to sell the personal property, goods and chattels of the decedent, and shows to the satisfaction of the court here that it will be necessary to sell all the said property, goods and chattels of said estate, not awarded to the widow, or selected and taken by her (and if an executor applies, say, and not specifically bequeathed to the legatees in the last will of the deceased, or as the fact may be): It is therefore ordered by the court that said administrator proceed to sell all of said personal property, goods and chattels not awarded to said widow or selected and taken by her, or specifically bequeathed as aforesaid, at public sale, as provided by law (or at private sale, or a specified part, at private sale, as the facts shown may require).

This order may specify a particular time and place of sale, and may direct a more extended notice of the sale, but cannot dispense with any of the positive provisions of the statute, as to the notice and the manner of making the sale. See §§ 338, 492.

Form No. 44.

(§§ 328 333.)

ADMINISTRATOR'S OR EXECUTOR'S SALE.

Notice is hereby given, that on —, the — day of — next, between the hours of 10 o'clock in the forenoon and 5 o'clock in the afternoon of said day, at the late residence of A — B—, deceased, the personal property of said decedent, consisting of — and other articles will be sold at public sale.

Terms of Sale.— Purchases of less than five dollars to be paid in hand; for that amount and over, on a credit of not less than six or over twelve months, the purchaser giving note with approved security.

G — C —, *Administrator*

Date.

The hours of sale are fixed by statute, § 95.

Form No. 45.

(§ 339.)

SALE BILL.

STATE OF ILLINOIS, }
 — County. } ss.

In County Court.

The following is a true and correct bill of the sale of the personal property, goods and chattels of the estate of A — B —, late of said county of —, deceased, made on the — day of —, 18 —, in pursuance of the order of this court and of notice thereof, a copy of which notice is hereunto attached (see Form No. 44), by the undersigned, administrator at —.

ARTICLES SOLD.	NAME OF PURCHASER.	AMOUNT OF SALE
.....		
.....		
.....		
Total amount of sales,		

We do hereby certify that the above sale bill of the estate of A— B—, deceased, is true and correct.

Given under our hands, this — day of —, 18—.

S— C—, *Clerk.*

B— T—, *Orier.*

STATE OF ILLINOIS, } ss.
— County.

G— C—, being duly sworn, on his oath says, that the foregoing is a true and correct bill of sale of the personal property, goods and chattels of A— B—, deceased.

G— C—.

Subscribed and sworn to before me this etc.

Form No. 46.

(§ 339.)

SALE BILL—PRIVATE SALE.

STATE OF ILLINOIS, } ss. *In County Court.*
— County.

The following is a true and correct bill of the sale of the personal estate of A— B—, deceased, made at the date herein stated, at private sale, in accordance with an order of this court, by G— C—, administrator of said estate.

Terms of sale: one-fourth in hand and the remainder on credit of six months, with good security.

WHEN SOLD.	ARTICLES SOLD.	NAME OF PURCHASER.	AMT. OF SALE.
.....			
.....			
.....			
	Total amt. of Sales,		\$

STATE OF ILLINOIS, } ss.
— County.

G— C—, being duly sworn, on his oath says, that the foregoing is a true and correct bill of the sale made by him at private sale of the

said personal property, goods and chattels of A— B—, deceased; that said sale was, in all respects, regular, according to the requirements of law and the order of this court, pursuant to which it was made, and was fairly conducted, and that each article was sold to the person, and at the price stated, and that he believes that the prices obtained were fair market prices at the date of sale.

G— C—.

Subscribed and sworn to before me, this — day of —, 18—.

Form No. 47.

(§ 343.)

INVENTORY OF PARTNERSHIP PROPERTY AND
LIABILITIES.

STATE OF ILLINOIS, }
— County. } ss.

IN THE MATTER OF THE ESTATE OF A— B—, DECEASED.

The following is a full, true and complete inventory, so far as known to the undersigned, of all the real and personal estate which belonged to, and the liabilities of, the partnership of A— B— & Co., composed of the following named persons, to wit: A— B— and W— S—, and of which A— B—, deceased, was, at the time of his death, a member, and which said estate belonged to, and said liabilities were owed by said partnership, at the time of his death.

Real Estate.

Lot 21, block 11 of C.'s addition to the city of X., in the county of—, and state of Illinois. Title, fee simple, and supposed to be perfect, subject to a mortgage of the said partners (describe it). This lot was occupied by the firm as a lumber yard.

Personal Estate.

(Here give a list as in Form No. 34.) Cash on hand at the time of decease..... \$327 00

Notes.

(Describe as in Form No. 34.)

Accounts.

(Specify as in Form No. 34.)

List of Liabilities so far as known.

To J — Y —, on note for \$ —, dated, etc., —. Interest at 10 per cent., —. No interest yet paid. Secured by mortgage on lot 21, block 11, etc.....	\$763 00
C — P — on note, describing it.....	309 00
F — C — account. Balance due him.....	45 00
Total of liabilities.....	\$1,117 00

STATE OF ILLINOIS, } ss.
 — County.

I do solemnly swear that the foregoing is a full, true and complete inventory of all the real and personal estate belonging to the partnership of A — B — & Co., at the time of the death of the said A — B —, of which I have any knowledge; and also a full, true and complete list of all the liabilities of said partnership at the time of the death of said A — B —.

W — S —,
Surviving Partner of A — B —, Deceased.

Subscribed and sworn to before me this — day of —, A. D. 18—.
 — —.

Form No. 43.

(§§ 344, 345.)

WARRANT TO APPRAISERS OF PARTNERSHIP PROPERTY.

STATE OF ILLINOIS, } ss. *In County Court.*
 — County.

The People of the State of Illinois, to C. P., B. H. and R. F., of the County of —, and State of Illinois, GREETING:

This is to authorize you, jointly, to appraise the goods, chattels and personal estate of the firm of A — B — & Co., composed of the following named persons, to wit: A — B — and W — S —, and of which A — B —, late of the county of —, and state of Illinois, deceased, was a member, so far as the same shall come to your sight and knowledge,

each of you having first taken the oath hereto annexed; a certificate whereof you are to return, annexed to an appraisement bill of said goods, chattels and personal estate, by you appraised, in dollars and cents, to W—— S——, the surviving member of said firm, on or by the —— day of —— next.

And in said bill of appraisement you are to set down in a column or columns, opposite each article appraised, the value thereof.

WITNESS, —— —, Clerk of the County Court of —— county, and
[L. s.] the seal of said court, this —— day of ——, 18—.

—— —, *Clerk.*

Form No. 49.

(§§ 344, 345.)

OATH OF APPRAISERS.

STATE OF ILLINOIS, } ss.
—— County.

We, and each of us, do solemnly swear that we will well and truly, without partiality or prejudice, value and appraise the goods, chattels and personal estate of the partnership of A—— B—— & Co., of which one A—— B——, deceased, was a member, so far as the same shall come to our sight and knowledge; and that we will in all respects perform our duties as appraisers, to the best of our skill and judgment.

Subscribed and sworn to this —— day of ——, A. D. 18—.

Form No. 50.

(§ 344.)

APPRAISERS' BILL—PARTNERSHIP PROPERTY.

STATE OF ILLINOIS, } ss. *In County Court.*
—— County.

An appraisement bill of goods, chattels and personal estate of the partnership of A—— B—— & Co., of which A—— B——, late of —— county, deceased, was a member, so far as the same has come to our sight or

knowledge, which appraisement has been made by us by virtue of the annexed warrant from the county court of said county, we having been first duly sworn, as required by law.

ARTICLES.	DOLLS.	Cts.
.....		
.....		
.....		

Given under our hands and seals this —, day of —, A. D. 18—.

C— P—, }
 R— H—, } *Appraisers.*
 B— F—, }

We, the appraisers above named, do certify that we have attended and served — day each, in appraising the estate of said firm of — —.

C— P—, }
 R— H—, } *Appraisers.*
 B— F—, }

OATH BY SURVIVING MEMBER OF FIRM.

I, W— S—, do solemnly swear that the foregoing is the appraisement bill of the goods, chattels and personal estate of the partnership of A— B— & Co., of which A— B—, deceased, was, at the time of his death, a member, returned to me by the above named appraisers, and that the same contains the articles of goods, chattels and personal estate belonging to said firm at the time of the decease of the said A— B—, except such as are shown by the inventory accompanying this appraisement bill, as sold since his decease by the member of the firm him surviving.

W— S—, *Surviving Partner.*

Sworn and subscribed before me this — day of —, 18—.

Form No. 51.

(§ 347.)

PETITION BY AN ADMINISTRATOR OF A DECEASED PARTNER, FOR A CITATION OF A SURVIVING PARTNER WHO IS COMMITTING WASTE, TO GIVE SECURITY FOR THE FAITHFUL SETTLEMENT OF THE AFFAIRS OF THE PARTNERSHIP, ETC.

To the Honorable Judge of the County Court of — County:

The undersigned G— C—, to whom letters of administration upon the estate of A— B—, late of the county of —, deceased, were heretofore granted by this court, respectfully represents, that at the time of his death, to-wit: on the — day of —, 18—, the said A— B—, was a member of the partnership of A— B— & Co., doing business in said county (see § 345), and composed of the following members, to-wit: said A— B—, deceased, and one W— S—, the said W— S— being now the surviving partner of said A— B—: That at the time of the death of said A— B—, the said partnership was the owner of certain real estate (describing it) of about the value of — dollars, and of personal property and notes and accounts deemed good, amounting in value to — dollars; and that said partnership was indebted to sundry individuals in the sum of — dollars; that said W— S— has sold the personal property of said partnership of the value of — dollars, and collected money from the debtors of said partnership amounting to — dollars, in all — dollars, yet the undersigned is informed and believes that said W— S— has not paid any portion of said debts, though he has often been requested by the partnership creditors so to do, nor has he accounted with the undersigned in any way for any part of the said partnership estate, or paid over to him any of said moneys, notwithstanding there is a large sum thereof, to-wit: — dollars, in his hands, in excess of the sum necessary to pay said debts, and has been frequently requested so to do. Wherefore the undersigned says that the said W— S— has committed waste of said partnership property by converting the same to his own use, and respectfully petitions your Honor to cause said W— S— to be cited to make answer in the premises, and that he may be ordered and required to give security in such sum as the court may determine, for the faithful settlement of the affairs of the said partnership, and for his accounting for and paying over to the undersigned as administrator as aforesaid whatever shall be found to be due after paying the said partnership debts and costs of settlement; and that a receiver of the partnership property and effects be appointed by this court in case the said W— S— shall refuse to give such security.

G— C—.

Add a jurat.

Form No. 52.

(§ 347.)

CLERK'S ENTRY OF AN ORDER REQUIRING A SURVIVING PARTNER WHO HAS COMMITTED WASTE OF THE PARTNERSHIP PROPERTY TO GIVE SECURITY, ETC.

IN THE MATTER OF THE APPLICATION OF G—— C——, ADMINISTRATOR OF THE ESTATE OF A—— B——, DECEASED, FOR AN ORDER REQUIRING W—— S——, SURVIVING PARTNER, OF SAID A—— B——, TO GIVE SECURITY FOR THE FAITHFUL SETTLEMENT OF THE AFFAIRS OF THE PARTNERSHIP, ETC.

And now comes G—— C——, administrator of the estate of A—— B——, deceased, and W—— S——, surviving partner of said A—— B——, in the late firm of A—— B—— & Co., and this cause coming on to be heard upon the application of said G—— C—— and the testimony of witnesses sworn and examined on behalf of both the said G—— C—— and W—— S—— in open court; and it appearing to the satisfaction of the court that the said W—— S—— has committed waste of the property of said partnership, by converting the moneys of said partnership in his hands, to his own use, and refusing to pay therewith the creditors of said partnership, and to pay over to said administrator moneys of said partnership rightfully applicable to that purpose: It is ordered by the court that the said W—— S—— give bond with good security, to the people of the state of Illinois, in the penal sum of — dollars, conditioned for the faithful settlement of the affairs of said partnership, and that he will account for and pay over to the said administrator of the estate of said A—— B——, deceased, whatever shall be found to be due, after paying partnership debts and costs of settlement of said partnership affairs; and that he have till Wednesday next to comply with this order; to which time this cause is continued.

Form No. 53.

(§ 347.)

**CLERK'S ENTRY OF AN ORDER APPOINTING A RECEIVER
OF PARTNERSHIP PROPERTY AND EFFECTS.**

Title of the cause as in Form No. 52.

And now, to wit: —, 18—, this cause again coming on to be heard, and the said W— S— having failed and refused to give security in compliance with order of this court made on the — day of —, 18—: It is ordered by the court that R— F— be and is hereby appointed receiver of the partnership property and effects of the late firm of A— B— & Co., with like powers, and subject to like duties in the premises, of receivers in chancery; that he proceed with due diligence to make and return to this court an inventory of all the property, moneys and effects of said firm in whosoever hands they may be; that he demand, sue for, collect and receive of all persons having the same, all property, moneys and effects of every kind belonging to said partnership; that he account for all such property, money and effects received by him or coming into his charge, and pay and apply the same as he may from time to time be directed and ordered by this court. And it is further ordered by the court that said R— F— enter into bond to the people of the state of Illinois, in the penal sum of — dollars, conditioned that he will file an inventory of said partnership property and effects, and as often as this court shall require him, account for what he shall receive or have in charge as such receiver, and pay and apply what he shall so receive or have in charge, as he may from time to time be directed or ordered by this court, and do and perform the duties of such receiver in all respects according to the true intent and meaning of this order, and of the statute in such case made and provided. And it is further ordered and directed by the court that the said W— S— deliver over to said R— F— all the property and effects of said partnership in his hands or under his control, including all securities in his hands for debts due and effects belonging to said partnership, and all books and papers relating thereto. And it is further ordered, that in case it shall be necessary to put any of said debts in suit for the recovery thereof, the said R— F— may make use of the name of the said W— S—, as surviving partner of said A— B—, deceased, for that purpose, provided, that said W— S— shall be indemnified out of said partnership property and effects against costs unnecessarily incurred by such suits. And the said R— F— having executed and presented to the court his bond as such receiver, as above directed, with C— C— and P— S—, as sureties, and the same being in all respects satisfactory, it is ordered by the court that the same be approved and filed.

Form No. 54.

(§ 348.)

ADMINISTRATOR'S NOTICE.

ESTATE OF A— B—, DECEASED.

The undersigned having been appointed administrator of the estate of A— B—, late of the county of — and state of Illinois, deceased, hereby gives notice that he will appear before the county court of — county, at the court house in —, at the — term, on the third Monday in — next, at which time all persons having claims against said estate are notified and requested to attend for the purpose of having the same adjusted. All persons indebted to said estate are requested to make immediate payment to the undersigned.

Dated this — day of —, 18—.

G— C—, *Administrator.*

3w. (See Gro. Stat. p. 6.)

Form No. 55

(§ 348.)

PROOF OF PUBLICATION OF NOTICE FOR CREDITORS TO
APPEAR.STATE OF ILLINOIS, }
— County. }*In County Court.*

The undersigned, G— C—, administrator of the estate of A— B—, late of said county, deceased, being duly sworn on his oath says that he has, pursuant to the requirements of the statute, given notice that he fixed on the present term of this court, at the court house in said county, for the settling and adjusting all claims against said decedent, and published notice thereof in a newspaper, called the —, published in —, in said county, and also by putting up a printed notice on the door of the court house, and in five other of the most public places in this county, namely: one at, etc., notifying and requesting all persons having claims against said estate, to attend at the present term of this court, for the purpose of having the same adjusted; said publication having been made, and said notices having been posted, as aforesaid, more than six weeks previous to the first day of the present term.

G— C—.

Subscribed and sworn to this — day of —, 18—.

Form No. 56.

(§§ 349, 354.)

CREDITOR'S AFFIDAVIT ON A CLAIM PRESENTED FOR ALLOWANCE.STATE OF ILLINOIS, } ss.
— County.*In the County Court.*

C— G—, of said county, being duly sworn, on his oath says, that the annexed account (or note) against the estate of A— B—, deceased, is just and unpaid, and that all just credits thereon are set forth and allowed.

C— G—.

Subscribed and sworn, etc.

Form No. 57.

(§ 362.)

CLERK'S ENTRY OF AN ORDER OF COURT APPOINTING A PERSON TO APPEAR AND DEFEND THE ESTATE, WHEN A CLAIM IS PRESENTED AGAINST IT BY THE PERSONAL REPRESENTATIVE, AND ALLOWANCE OF CLAIM.

IN THE MATTER OF THE CLAIM OF G— C—, ADMINISTRATOR OF THE ESTATE OF A— B—, AGAINST SAID ESTATE.

Now comes G— C—, and files his claim for allowance against the estate of A— B—, deceased, and the said G— C—, being now the administrator of said estate: It is ordered that W— P—, Esq., be, and is hereby appointed to appear and defend said estate in the premises. And thereupon the said W— P— appeared, and this cause now coming on to be heard upon the exhibits and testimony of witnesses therein, and the court being satisfied that the said claim of G— C— against said estate is just and true, and that there is due to him thereon the sum of— dollars: It is considered and adjudged by the court that the said claim of said G— C—, amounting to — dollars, be allowed against said estate, and that the same be paid in due course of administration of said estate.

Form No. 58.

(§ 401.)

**CLERK'S ENTRY OF A JUDGMENT WHERE THE SPECIAL
LIMITATION OF TWO YEARS APPLIES TO IT.**

After stating the title of the cause and allowing the claim as in other cases, add —

And that the same be paid in due course of administration out of the estate of said A—— B——, deceased, not inventoried or accounted for by the administrator within two years after the date of letters of administration upon said estate.

Form No. 59.

(§§ 406, 368.)

**CLERK'S ENTRY OF A JUDGMENT IN FAVOR OF A CRED-
ITOR OF THE PARTNERSHIP OF WHICH THE DECEASED
WAS A MEMBER.**

Add to the ordinary judgment—

And that the same be satisfied in due course of administration, out of such estate only of the deceased as remains after paying his individual debts and the costs of administration.

Form No. 60.

(§ 412.)

**COMPLAINT OF PERSONAL REPRESENTATIVE OR PERSON
INTERESTED IN THE ESTATE, THAT ANY PERSON HAS
IN HIS POSSESSION, OR HAS CONCEALED OR EMBEZZLED
GOODS OF THE ESTATE**

To the Honorable Judge of the County Court of — County :

The undersigned G—— C——, administrator (or a creditor or heir) of the estate of A—— B——, deceased, respectfully represents unto your Honor, that he believes one H—— P——, of — county, has in his pos-

session (or conceals or has embezzled) a certain (here describe the article,) belonging to said A—— B——, and wrongfully refuses to deliver the same to the undersigned after demand made therefor. Wherefore the undersigned prays that said H—— P—— may be cited to appear before said court and compelled to answer such interrogatories as may be propounded to him touching the said ——, and to deliver said —— to the undersigned.

G—— C——.

Add a jurat.

Form No. 61.

(§ 412.)

FORM OF CITATION AGAINST A PERSON WHO HAS IN HIS POSSESSION, OR HAS CONCEALED OR EMBEZZLED PROPERTY OF THE ESTATE.

STATE OF ILLINOIS, }
 —— County. } ss.

The People of the State of Illinois, to H—— P——:

WHEREAS, G—— C——, administrator of the estate of A—— B——, deceased (or as the fact may be), has presented his complaint under oath to the county court of —— county, setting forth that (here copy the charge in the complaint).

You are therefore hereby cited to appear before said court—— on the first day of the next term thereof, to be begun and holden at —— on the third Monday of ——, 18—, then and there to make answer under oath to said complaint, and to do and abide by what our said court shall in that behalf consider.

And hereof fail not at your peril.

Add the usual attestation clause.

Form No. 62.

(§§ 412, 414.)

CLERK'S ENTRY OF PROCEEDINGS UNDER A CITATION TO
ANSWER ON A CHARGE OF POSSESSING, CONCEALING
OR EMBEZZLING PROPERTY BELONGING TO AN ESTATE.

IN THE MATTER OF THE CITATION OF H—— P——, FOR WRONGFULLY
KEEPING IN HIS POSSESSION (OR EMBEZZLING) A (CERTAIN NOTE)
BELONGING TO A—— B——, DECEASED, FROM G—— C——, ADMIN-
ISTRATOR OF THE ESTATE OF SAID A—— B——.

And now comes G—— C——, administrator of the estate of A—— B——, deceased, and also H—— P——, who has been cited to answer in this cause, and the said cause coming on to be heard, upon the complaint under oath of said G—— C——, alleging that (set out the charge contained in the complaint); and the said H—— P——, *now refusing to answer proper interrogatories propounded to him touching the possession by him of said —: It is considered and adjudged by the court that he be committed to the jail of — county until he shall answer said interrogatories.

Or, where answer is made claiming property in the respondent, proceed as before to the asterisk, and add—

Answering under oath, admits having the possession of said —, but insists that he is the owner thereof (or as the fact may be), and the court having heard the testimony of witnesses produced, sworn and examined in behalf of each party, and it appearing to the court that the said — is the property of A—— B——, deceased, and that the same is possessed and unlawfully detained by said H—— P—— from the said G—— C——, as administrator as aforesaid: It is ordered by the court that H—— P—— immediately deliver the said — to said G—— C——, upon his demand therefor.

Form No. 63.

(§§ 415, 417.)

SUGGESTION BY THE PERSONAL REPRESENTATIVE TO THE
COUNTY COURT, THAT CLAIMS DUE THE ESTATE ARE
DESPERATE, ETC.

To the Honorable Judge of the County Court of — County.

The undersigned, administrator of the estate of A — B —, deceased, suggests and makes known to the court here, that the following claims, debts and demands belonging to said estate, and which accrued in the lifetime of said A — B —, are desperate, for the reasons here stated, to-wit:

Note of E — F —, dated —, 18—, for — dollars, payable on demand. The maker insolvent (or gone to parts unknown).

Account against O — P —, for balance of — dollars, due since —, 18—. Barred by statute of limitations, which the debtor threatens to plead against it.

The undersigned therefore asks that an order may be made for the compounding or selling of said claims, or such other order as the court shall deem proper in the premises, and as is authorized by law.

G — C —.

This form can easily be varied to meet any case arising under the statute.

Form No. 64.

(§§ 415, 417.)

NOTICE OF APPLICATION BY A PERSONAL REPRESENTATIVE,
FOR AN ORDER TO SELL OR COMPOUND DESPERATE
CLAIMS.

To all whom it may concern:

WHEREAS, The undersigned, administrator of the estate of A — B —, deceased, has filed in the county court of — county, a suggestion that certain claims, debts and demands due to said estate from E — F — and O — P —, are desperate.

Notice is therefore hereby given that the undersigned will apply to said county court, at the next term thereof, to be begun on the third Monday

in —, 18—, for an order to sell or compound said claims; when and where all persons interested can appear and show cause why such order should not be made, if they think proper.

Dated this — day of —, 18—.

2w.

G— C—, *Adm'r.*

Form No. 65.

(§§ 415, 417.)

CLERK'S ENTRY OF AN ORDER TO SELL OR COMPOUND CLAIMS.

IN THE MATTER OF THE APPLICATION OF G— C—, ADMINISTRATOR OF THE ESTATE OF A— B—, DECEASED, FOR AN ORDER TO SELL OR COMPOUND (OR AS THE CASE MAY BE) CLAIMS (DEBTS AND DEMANDS) WHICH ACCRUED TO SAID A— B—, IN HIS LIFETIME.

And now comes G— C—, administrator of the estate of A— B—, deceased, and this matter coming on to be heard upon the suggestion of said G— C—, heretofore filed in this court, showing that certain claims (debts and demands), which accrued to said A— B—, in his lifetime, to-wit: (here state the character of each claim against whom and the amount of the same), are desperate, and upon his application for an order to (sell, or compound, or file in this court, etc., according to the fact); and due notice to all whom it may concern of the time and place of making said application having been given by said G— C—, and no one appearing to show cause why such order should not be made: It is therefore ordered by the court that the said claims be sold by said administrator at public sale to the highest bidder (here direct the manner and time of notice, § 415, as, at private sale; or, that they be filed in this court for the benefit of such heirs, devisees or creditors of the deceased, etc., see § 415); and that he make report thereof to this court.

Form No. 66.

(§§ 415, 417.)

**REPORT OF SALE OR COMPOUNDING OF DESPERATE DEBTS,
ETC.**STATE OF ILLINOIS, } ss.
— County.*In County Court, — Term, 18—.**To the Honorable Judge of said Court :*

The undersigned, administrator of the estate of A— B—, deceased, respectfully submits the following report of the sale (and compounding) of desperate claims (debts and demands), belonging to the estate of said A— B—, made and done in pursuance of an order of this court, at the — term thereof:

That he compounded the claim against E— F—, on his note for.....	\$150 00
That he sold the note of R— P— at public (or private) sale, after giving notice thereof as required by said order, at.....	35 00
Total amount received for desperate claims	<u>\$185 00</u>

That he was unable to compound with W— S— the note against him, or to sell the same, and therefore brings the same into court, to be filed therein.

G— C—, *Administrator.***Form No. 67.**

(§§ 436, 437.)

**PETITION BY PURCHASER OF LAND FOR AN ORDER TO
CONVEY.**STATE OF ILLINOIS, } ss.
— County.*In the Circuit Court, — Term, A. D. 18—.**To the Honorable Judge of said Court :*

Your petitioner, R— P—, respectfully represents,

That, on the — day of —, A. D. 18—, one C— D— executed and delivered to him a contract (or bond or agreement) bearing date the day and year last mentioned,—a copy of which contract, marked "Exhibit A," is hereto annexed and made a part of this petition; (or, of which the fol.

lowing is a copy,) — whereby the said C—— D—— agreed (or bound himself) to convey by — deed to your petitioner the following described land (describe the land as in the agreement, stating the county in which it is situated), upon the payment to him, the said C—— D——, of the sum of — dollars, payment whereof was secured by three promissory notes of your petitioner, bearing even date with said agreement, each calling for — dollars and interest, payable annually, at — per cent.; one payable one year, one two years, and one three years after date.

And your petitioner further represents, that he fully paid each of said notes, on or about the — day of —, 18—, and was then entitled to a deed of conveyance of said land; that the said C—— D——, immediately thereafter, to wit: on or about the — day of —, 18—, departed this life, without having executed and delivered to your petitioner a deed of conveyance of said land, leaving A—— D—— and F—— D——, his only children and heirs. That said A—— B—— was, on or about the — day of —, 18—, appointed administrator of the estate of said C—— D——, deceased, by the county court of said county of —, in the state of Illinois; and that said F—— D—— is a minor, and has no guardian.

(If part of the payment for the land was made to the administrator, the petition may allege payment of a part to the deceased; his death, the appointment of his administrator; the payment of the remaining money to the administrator; the survivorship of the children, etc. The survivorship of the wife need not be alleged, except in case there were no surviving children, when she becomes an heir.)

Your petitioner therefore prays the aid of this court in the premises; that a guardian ad litem for the said defendant F—— D—— may be appointed, and that the court will order the said administrator to execute and deliver to your petitioner a deed of conveyance of said land, according to the intent and meaning of said contract.

R—— P——.

O—— R——, *Sol'r for Petitioner.*

NOTE.— This form can easily be changed to a petition by the administrator for an order to convey.

Form No. 68.

(§ 436.)

ORDER DIRECTING AN ADMINISTRATOR TO CONVEY LAND.

STATE OF ILLINOIS, }
 — County. } *In the Circuit Court, —Term, A. D. 18—.*

O— R—, <i>Petitioner,</i> <i>vs.</i> A— B—, administrator of the estate of C— D—, deceased, and A— D— and F— D—, <i>Defendants.</i>	}	ORDER OF CONVEYANCE.
---	---	----------------------

And now, to wit: —, 18—, comes the petitioner, by L— N—, his solicitor, and it appearing to the court that the defendants, A— B— and A— D—, have been duly served with process in this cause more than ten days before the first day of the present term of this court, and the said A— B— and A— D— having been severally three times solemnly called, came not but made default: It is therefore ordered by the court that the said petition be taken as confessed by them. And it further appearing to the court that the defendant, F— D—, was duly served with process in this cause more than ten days before the first day of the present term of this court, and that he is a minor and has no guardian: It is ordered by the court that R— C—, Esquire, be appointed guardian *ad litem* for him. And thereupon the said guardian *ad litem* files the answer of said minor defendant herein, showing nothing against the prayer of the petition.

And now, to wit: —, 18—, this cause coming on to be heard upon the petition, exhibit, answer of guardian *ad litem*, and the testimony of witnesses examined in open court, and it satisfactorily appearing to the court that (here set forth the findings of the court in conformity to the material allegations of the petition; or, that the several material allegations of the petition have been proven to the satisfaction of the court), and that the petitioner is entitled to have a — deed from said A— B—, conveying to him said lands (or the following described lands, etc.) It is therefore adjudged and ordered by the court that the said A— B—, as administrator of the estate of C— D—, deceased, execute and deliver to said petitioner a — deed, conveying to him the said land (the quality of the deed may be specified). And that the petitioner have and recover of and from the estate of the said C— D— his costs in this behalf expended, to be paid in due course of administration.

For form of deed see Form No. 83, and notes, which will sufficiently guide in this matter.

Form No. 69.

(\$ 452.)

ACCOUNT OF PERSONAL ESTATE AND DEBTS TO BE MADE
PREPARATORY TO FILING A PETITION FOR AN ORDER
TO SELL REAL ESTATE.

STATE OF ILLINOIS, }
— County. } ss.

In the County Court.

A JUST AND TRUE ACCOUNT OF THE PERSONAL ESTATE AND DEBTS OF
C— D—, LATE OF SAID COUNTY, DECEASED.

The undersigned A— B—, administrator of the said estate, charges
himself with the following specified personal estate:

To amount of sale bill	\$500 00
“ widow's award	1,000 00
“ collected of C— B— on note	50 00
“ “ of H— C— on account	90 00
Total amount received from all sources....	<u>\$1,640 00</u>

CONTRA.

And the said administrator credits himself with the following disbursements, made pursuant to the order of court, as appears by the records thereof (or, by receipts herewith presented).

1873, Jan. 24. By cash paid O. R.....	\$75 00
“ Feb. 1, “ H. C.....	425 00
“ 1, “ widow for her award	1,000 00
“ 1, “ R. S.....	78 00
“ 1, “ F. G. Welton, clerk's fees.....	12 00

Total amount paid out ...	\$1,590 00
Amount in administrator's hands	50 00

Amount of Debts due said Estate, not collected.

Note of O. S., (doubtful).....	\$45 68
Note of C. C., (desperate)	25 00
Account of W. S., (desperate)	83 25

Total amount due estate, doubtful and desperate.....	\$153 93
--	----------

Amount of Claims allowed against the Estate, as appears from the Records of the Court.

E— H—.....	690 00
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(Here state each account allowed, including widow's award,
stat. § 70; 38 Ill. 301).

Total amount of claims allowed.....	\$3,165 00
-------------------------------------	------------

Estimated amount of just claims to be presented, including costs of administration.....	\$800 00
Total indebtedness of estate.....	\$3,965 00
Deducting amount paid out.....	1,590 00
	\$2,375 00
Deduct probable amount which may be collected on doubtful and desperate debts.....	25 00
Leaving a deficit of personal assets of.....	<u>\$2,350 00</u>

I, A— B—, administrator of the estate of C— D—, deceased, do certify that the foregoing is a just and true account of the personal estate and debts of said deceased, as far as I have been able to discover.

A— B—.

March 20, 1873.

Form No. 70.

(§§ 453, 457, and consult also §§454, 455, 456, 458.)

**FORM OF PETITION FOR AN ORDER TO SELL REAL ESTATE
TO PAY DEBTS.**

STATE OF ILLINOIS, } ss. In County Court, — Term, A. D. 18—.

— County. }

To the Honorable Judge of said Court:

Your petitioner, A— B—, administrator of the estate of C— D— (or, if such is the fact, "administrator with the will annexed, of the estate of C— D—;" or, "executor of the last will and testament of C—D —"), late of said county, deceased, respectfully represents:

That the said C— D— departed this life at —, on or about the — day of —, 18—.

That your petitioner was, on the — day of —, 18—, appointed by this court, administrator of the estate of said C— D— (or according to the fact), as will appear by the record thereof remaining in this court.

That an inventory, appraisement bill and sale bill of said estate have been made and filed in the office of the clerk of this court, and been duly approved by this court; and that your petitioner has made to this court a just and true account of the personal estate and debts of the said C— D—; which said account was approved by this court.

That the personal estate of said C— D—, as will more particularly appear from the aforesaid account, amounts to — dollars, exclusive of doubtful claims in the hands of your petitioner, amounting to — dol.

lars, and desperate claims in his hands, amounting to — dollars, from which he will probably collect about the sum of — dollars.

That the claims allowed against said estate amount to — dollars, as appears by the said account, and that in addition thereto, your petitioner estimates that there are just claims against said estate, to be presented, amounting to about — dollars, held by the following named persons, to wit:

D— S—.....	\$570 00
R— P—.....	950 00
Total.....	<u>\$1,520 00</u>

Making the total indebtedness of said estate — dollars; to which must be added the costs of administration, amounting to about — dollars.

That your petitioner has paid the sum of — dollars upon claims of the *first, second, third, fourth and fifth classes*, as appears by his said account, rendered to this court, at the — term thereof, 18—, leaving in his hands the sum of — dollars.

And that there is a deficiency of personal estate to pay the remaining claims against said estate and the costs of settling thereof, amounting to about — dollars.

And your petitioner further represents, that the said C— D— died having claim and title¹ to real estate situated in said county of —, and state of Illinois, described as follows, to-wit: —; also, the following described real estate situated in — county, in said state, to-wit: —.²

That the said C— D— left him surviving B— D—, as his widow, having a dower interest in his real estate, and the following named children, A— D— and F— D—, his only heirs, of whom said F— D— is a minor, under twenty-one years of age (if a male, or eighteen years of age, if a female. See *Burson v. Goodspeed*, 4 Leg. News, 242), and has no guardian resident in the state of Illinois. (If any heir or devisee has a guardian or a conservator, that fact should be stated, together with the name of such guardian or conservator. If the deceased died testate, then, after setting forth the facts in reference to his widow and children, if any, as above directed, add, "and also the following named devisees, to-wit: R— F— and C— F—," and if they are minors or have conservators, set forth that fact as above directed. If any other person is actually occupying the premises, add, "and your petitioner further represents that one O— R— is an actual occupant of the said premises," or some part thereof, if such is the fact, and describe such part. If persons whose names are unknown are interested in the premises, that fact may be

¹ See note at the end of this form.

² When the petition and all the subsequent papers and deed in the case, describe a different tract of land from that intended, equity will not correct the mistake, and compel the conveyance of the tract intended by the personal representative to be sold. *Ward v. Brewer*, 19 Ill. 291.

set forth thus: "and the unknown owners of so much of said premises as descended, or was devised, to R— D—, deceased;" or, "the unknown children," etc.*)

Wherefore, in consideration of the premises, your petitioner prays that this court may appoint some discreet person as guardian *ad litem* for said minor heir, to appear and defend his interest herein. And that this court will order and direct your petitioner to sell the said real estate, or so much thereof as may be necessary to pay said deficiency, and to make such further order herein as to this court may seem proper.

L— N—, *Solicitor*.

A— B—, *Adm'r* (or *Ex'r*.)

STATE OF ILLINOIS, } ss.
— County. }

A— B—, the above mentioned petitioner, makes oath and says that the allegations contained in the foregoing petition, are true according to his best knowledge and belief.

. A— B—.

Subscribed and sworn before me this — day of —, 18—.

NOTE. Where it is desirable to have dower assigned (see §§ 512-522) to the widow before the sale, it would be proper to insert at the * in the above form, as follows:

And your petitioner further says, that the said C— D—, at the time of his death, had no claim and title to any real estate within the state of Illinois, so far as your petitioner has been able to discover, except that above described, and that if the said widow's dower therein shall be previously allotted to her, it will enable him to sell the remainder for a higher price than could otherwise be obtained therefor. [And in place of the closing paragraph, insert as follows.]

And that this court will cause to be allotted and set off to said B— D— her dower in the said real estate, and order and direct your petitioner to sell the said real estate or so much thereof as may be necessary to pay said deficiency, and to make, etc."

We have seen (ante, §§ 513-520) what character of estates are subject to dower. The statutory words, "having claim and title," as describing the interest of the deceased in the real estate, are not, it is conceived, a sufficient description for the purpose of having dower assigned. In *Davenport v. Farrar*, 1 Scam. 315, it was held, that the words "owner and proprietor" were insufficient in a petition for dower to describe the estate of the deceased husband of the petitioner, and that the petition should state such facts as would show that the deceased was possessed of such an estate as is contemplated by the statute.

If the widow applies to have dower assigned to her, under the statute giving jurisdiction to county courts, it would be proper to do so by cross-petitions in the form of a cross-bill in equity. And such a petition should state the original petition, or rather the parties, and prayer, and objects of it, the proceedings thereon, and the rights of the party exhibiting the petition.¹

The widow should file her answer before filing the cross-petition.

¹ Story's Eq. Pl. § 401.

Form No. 71.

(§§ 464, 466, 467.

RETURN OF SERVICE OF A SUMMONS.

I have served this summons upon the within named C— S— and J— S—, by reading the same to them, and upon the within named R— S—, by leaving a copy thereof at his usual place of abode, with D— S—, his daughter, who is a member of his family, over ten years of age, and informing her of the contents thereof, this— day of—, 18—. F— S— not found in my county.

C— P—, *Sheriff*.**Form No. 72.**

(§ 468.)

AFFIDAVIT OF NON-RESIDENCE, ETC., OF A DEFENDANT.

(This may be annexed to the petition.)

STATE OF ILLINOIS, }
— County. } ss.*In the County Court. — Term, 18—.*A— B—, Administrator of the estate
of C— D—, deceased, *Petitioner*,
*vs.*B— D—, A— D—, and others,
*Defendants.*PETITION FOR AN ORDER TO
SELL REAL ESTATE.

The said A— B—, upon his oath says, that the said A— D— resides out of the state of Illinois, and that the place of his residence is unknown to this affiant (or, that he resides at Lowville, Lewis county, New York. Any other fact may be stated as a reason for non-service of process, as required by § 104 of the statute).

A— B—.

Subscribed and sworn, etc.

Form No. 73.

(§§ 468, 469, 474.)

NOTICE OF PETITION FOR AN ORDER TO SELL REAL ESTATE
TO PAY DEBTS.

ADMINISTRATOR'S NOTICE.

STATE OF ILLINOIS, } ss. *In County Court, — Term, 18—.*
— County.

A— B—, Administrator of the estate of C— D—, deceased, <i>Petitioner</i>, <i>vs.</i> B— D—, A— D—, F— D—, O— R—, and the unknown owners, of so much of the premises hereinafter described as descended (or was devised) to R— D—, deceased, from (or by) said C— D—, deceased, <i>Defendants</i>.	}	PETITION FOR AN ORDER TO SELL REAL ESTATE. (§ 453.)
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An affidavit having been filed by the petitioner (or O— K—, solicitor for the petitioner), in the office of the clerk of said court, showing that said defendant, A— D—, resides out of this state, and that the place of his residence is unknown to the affiant; (following the allegations in the affidavit,) notice is therefore hereby given to said A— D—, that the said A— B— has filed his petition in said court, praying for an order to sell the following described real estate, situated in — county, Illinois, to wit: (correctly describe the premises,) to pay the debts and claims against the estate of said C— D—, and that summons in said cause will be returnable at the — term of said court, to be holden at the court house in —, in said county, on the *Third Monday* in —, 18—.

Now, unless you, the said A— D—, shall appear before said court, on the first day of said term thereof, and plead, answer or demur to the said petition, the allegations contained therein will be taken as confessed by you, and an order entered in accordance with the prayer of said petition.

F— G— W—,
Clerk of the County Court.
(4w.)

O— K—, *Sol'r for Petitioner.*

NOTE.—The clerk must, within ten days of the first publication of the notice, send a copy thereof by mail, addressed to the defendant whose place of residence is stated in the affidavit. § 468.

Form No. 74.

(§§ 471-473.)

PRINTER'S OR PUBLISHER'S CERTIFICATE OF PUBLICATION.

I, C— B—, printer (or publisher) of the — —, a weekly newspaper published in —, — county, Illinois, do certify that the notice, of which the annexed is a copy, was published in said newspaper, four successive weeks, and that the date of the first paper containing the same was —, 18—, and the date of the last paper containing the same was —, 18—.

—, —, 18—.

C— B—.

Printers' fees, \$—. Paid by (the administrator).

C— B—.

Form No. 75.

(§ 476.)

ANSWER OF GUARDIAN AD LITEM.

STATE OF ILLINOIS, }
 — County. } ss. *In County Court, — Term, A. D. 18—.*

A— B—, Administrator of the estate
 of C— D—, deceased, *Petitioner,*

vs.

B— D—, A— D— and F—
 D—, and others, *Defendants.*

PETITION FOR AN ORDER TO
 SELL REAL ESTATE.

The answer of the said F— D—, infant defendant to said petition, by R— C—, his guardian *ad litem*, respectfully sheweth, that (here set out the special matter of defense, as that the deceased was not indebted to the claimants mentioned in the petition, or) he is not advised concerning the matters alleged by the petition, and therefore prays the protection of the court in the premises.

By R— C—, *his Guardian ad litem.*

Form No. 76.

(§§ 481-496.)

ORDER OF SALE.

STATE OF ILLINOIS, } ss.
— County.*In County Court, — Term, A. D. 18—.*

A— B—, Administrator of the estate of C— D—, deceased, <i>Petitioner</i> , <i>vs.</i> B— D—, A— D—, F— D—, and O— R—, <i>Defendants</i> .	}	ORDER OF SALE OF LANDS TO PAY DEBTS.
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And now, to wit: —, 18—, comes the petitioner, by L— N—, his solicitor, and the defendant, B— D—, by S— T—, her solicitor, comes and files her answer to the petitioner's petition; and it appearing to the court that the defendant, A— D—, is a non-resident of the state of Illinois, and has been duly notified of the pendency of this cause by publication of notice thereof, and sending a copy thereof by mail addressed to him as required by law, and that the defendant, O— R—, has been duly served with process in this cause according to law, ten days before the first day of the present term of this court; and the said A— D— and O— R—, having been severally three times solemnly called, came not, but made default: It is therefore ordered by the court that said petition be taken as confessed by them. And it further appearing to the court that the defendant, F— D—, was duly served with process in this cause ten days before the present term of this court, and that he is a minor and has no guardian resident in this state: It is ordered by the court that R— C—, Esquire, be appointed guardian *ad litem* for him. And thereupon the said guardian *ad litem* files the answer of said minor defendant herein, showing nothing against the prayer of the petition; and the petitioner files his replication to the answer of said defendant B— D—.

And now, to wit; —, 18—, this cause coming on to be heard upon the petition, answers and replication aforesaid, and the records of this court and testimony of witnesses examined in open court, and it satisfactorily appearing to the court that the said C— D— departed this life on or about the — day of —, A. D. 18—, leaving B— D—, his widow, and the following named children, viz: A— D— and F— D—, his only heirs; that the petitioner was appointed administrator of the estate of said C— D—, deceased, by this court, on the — day of —, 18—, and that the said petitioner has made a just and true account to this court

of the personal estate and debts of the said C—— D——, showing that said personal estate is insufficient to pay the just claims against the estate of said C—— D——; and it appearing to the court that the deficiency aforesaid amounts to the sum of —— dollars, together with interest and costs. And it further appearing to the court that the said C—— D—— died having claim and title to the following described real estate situated in the county of ——, and state of Illinois (here describe it as in the petition).

And it further appearing to the court that it will be necessary to sell the above described real estate (or, such part of it as the court may direct) to pay the deficiency aforesaid with the expenses of administration now due and to accrue.* It is therefore ordered by the court, that the said petitioner proceed according to law (see ante, § 497) to advertise and make sale of the real estate above described, or so much thereof as may be necessary to pay said deficiency, together with the expenses of administration now due and hereafter to accrue.** And it is further ordered by the court that said sale be made on the following terms, to wit: one half of the purchase money to be paid upon the confirmation of the petitioner's report of said sale by this court, and the remainder —— months thereafter; such remainder to be secured by note with good personal security and mortgage on the premises sold: and that the petitioner make report to this court of his proceedings in this behalf with convenient speed. (See ante, § 497.)

J—— H——, Judge, etc.

NOTE.—It may be desirable to give more specific directions in regard to the sale. In such case the following form may be satisfactory:

It is therefore ordered by the court, that the petitioner proceed to sell said real estate (or such part as the court may direct), or so much thereof as may be necessary to pay said deficiency, together with the expenses of administration now due and hereafter to accrue, at public vendue, to the highest bidder; said sale to be made on the premises (or, at the front door of the post office in the city of ——, in said county of ——), on such day as he shall appoint, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon; and that the petitioner first give not less than —— weeks public notice of such sale, by posting up not less than —— large printed notices in the most public places in said county, and also by causing a similar notice thereof to be published —— successive weeks in the newspaper printed nearest to said lands, in this state (or in the *Kewanee Independent* and the *Prairie Chief*, one of which must be the nearest newspaper to the lands); such notices to state the time, place, and conditions of the sale, and a description of the premises to be sold. Conclude as above, or as may be desirable.

FORM OF ORDER WHERE DOWER IS ASSIGNED — APPOINTMENT OF COMMISSIONERS TO SET OFF DOWER.

(Stat. Dower, § 24; Gro. Stat. p. 220, § 36, and see pp. 218-220.)

Where the *personal representative* prays for the allotment of dower to the widow (see §§ 512-522), the order appointing the commissioners may follow the foregoing form as far as the asterisk (*) and then continue as follows:

And it further appearing to the court that said C—— D—— was seized of said real estate in fee (or any other estate of inheritance, according to the fact), that said B—— D——, as widow of said C—— D——, is entitled to dower in all of said premises:

It is therefore ordered and adjudged by the court that the said B—— D—— be endowed of one third part of said real estate, and that L—— G——, F—— C—— and M—— P—— be appointed commissioners, to set off and allot to said B—— D—— her dower in said premises. And it is further ordered that said commissioners first take the oath prescribed by law, and then go upon said premises, and allot and set off to said B—— D—— her dower by metes and bounds, according to quality and quantity, of said premises, giving her the homestead or dwelling house of said C—— D——, deceased, if she desires it (and may set off and allot the whole of said dower in a body, or out of two or more of said tracts of land, in such manner as they may deem best to all persons interested), and make return in writing under their hands and seals, to the court, of their doings in this behalf by virtue hereof; and if the said commissioners find that said premises are not susceptible of division without great injury thereto, they will so report to the court.

Form No. 77.

(Stat., title Dower, § 24.)

OATH OF COMMISSIONERS APPOINTED TO ASSIGN DOWER.

State venue and title of the case as in the Order, No. 76.

I do solemnly swear that I will fairly and impartially allot and set off to B—— D——, widow of C—— D——, her dower out of the lands and tenements described in the order of the court, for that purpose, in the above entitled cause, if the same can be made consistently with the interest of the estate, according to the best of my judgment: So help me God.

L—— G——.
F—— C——.
M—— P——.

Subscribed and sworn before me, this — day of —, 18—.

J— K—, *J. P.*

NOTE.—The oath must be administered by the court or a justice of the peace. (Stat. Dower, § 24.) The commissioners must be sworn, and the statement of that fact, with the oath they took, should accompany their report. *Loyd v. Malone*, 23 Ill. 43.

Form No. 78.

(Gro. Stat. Dower, p. 219, § 29.)

REPORT OF COMMISSIONERS TO ASSIGN DOWER.

State venue and title of the case as in the Order, No. 76.

To the Honorable, Judge of said Court:

The undersigned, commissioners, appointed by an order of said court in the above entitled cause, to allot and set off to B— D—, widow of C— D—, deceased, her dower out of the real estate described in said order of the court, do in conformity with law and the said order make the following report:

That having first taken and subscribed an oath to fairly and impartially allot and set off to said B— D— her dower in the premises aforesaid, if the same could be done consistently with the interest of the said estate, and according to the best of our judgment; which oath is hereto attached and made a part of this report; we afterwards, to-wit: on the — day of —, 18—, went upon said real estate, and after having carefully examined the quality and ascertained the quantity by admeasurement thereof, we proceeded to allot and set off to the said B— D— her dower out of the same, by metes and bounds, according to quality and quantity, in the following manner, to-wit: We allotted to her the homestead or dwelling house of the said C— D—, deceased, according to her desire, with the following described tract or parcel of land upon which the same is situated. [Here describe the tract.] All of which is respectfully submitted.

Witness our hands and seals this — day of —, 18—.

•

L— G—. [SEAL]

F— C—. [SEAL]

M— P—. [SEAL]

The report must be under seal. Stat. Dower, § 25.

Form No. 79.

(Stat. Dower, § 29.)

**ORDER APPROVING THE REPORT OF THE COMMISSIONERS
TO ASSIGN DOWER, AND FOR THE SALE OF THE RE-
MAINING LAND TO PAY DEBTS.**

Title of the cause, etc., as in Form No. 76.

And now, to wit: comes again the petitioner, by his solicitor, and the defendant, R— D—, by her solicitor, and the said minor defendant, F— D—, by R— C—, his guardian *ad litem*, and the commissioners heretofore appointed by this court, to allot and set off dower to said B— D— out of the real estate described in the petition, having made and filed their report, showing that they had allotted and set off from said real estate, to wit: [here describe it as in the petition] unto the said B— D—, as and for her dower therein [here describe the dower as in the report], and it appearing to the court that said commissioners have complied in all respects with the law and with the order of this court appointing them as such, and no objections or exceptions having been made to their report: It is ordered that the said report be approved, and that the said B— D— have as and for her dower in the said real estate mentioned in the petition, all that portion thereof above described as allotted and set off to her by said commissioners. And it is further ordered by the court, that the said petitioner proceed, according to law, to advertise and make sale of the real estate above described to wit: [here describe all of the real estate mentioned in the petition, including that set off for dower, which latter will of course be sold subject to the dower interest], or so much thereof as may be necessary to pay the deficiency of personal estate of said C— D—, deceased, to satisfy the just claims against his estate, heretofore ascertained and found by the court, in this cause, to be — dollars, and interest, and also the expenses of administration now due and hereafter to accrue. [Proceed as in Form No. 76 after the double asterisk, **.]

Form No. 80.

(§§ 497, 499.)

NOTICE OF SALE.**ADMINISTRATOR'S SALE OF REAL ESTATE.**

By virtue of an order of the county court of — county, in the state of Illinois, made at the — term thereof, A. D. 18—, upon the petition of the undersigned, administrator of the estate of C— D—, deceased, against B— D— and others, I will, on the — day of — next, between the hours of ten o'clock in the forenoon and five o'clock of the afternoon of said day, sell at public vendue, at the front door of the court house, in the village of —, in — county (or on the premises, or at the front door of the post office in —, etc.), the following described real estate situated in — county, in the state of Illinois, to wit; all the interest of the said C— D—, deceased, in the (here describe the real estate with common certainty).

Terms of sale: one-third in hand and the remainder in — months; to be secured by note with good personal security and mortgage of the premises sold. No conveyance to be made till the sale has been reported and approved by said court. (The terms, of course, will follow strictly the directions of the order of sale.)

A— B—, *Administrator.*

Date.

4w.

The advertisement must follow the directions, if any, in the order as to the time, place and terms of sale; otherwise the requirements of the statute are all that are necessary.

Form No. 81.

(§ 497.)

REPORT OF SALE.

STATE OF ILLINOIS, } ss.
— County. }

In the County Court.

A — B—, Administrator of the estate
of C— D—, deceased, *Petitioner*,
vs.
B— D—, A— D—, F— D—,
and O— R—, *Defendants.*

PETITION FOR ORDER TO
SELL REAL ESTATE.—RE-
PORT OF SALE.

To the Honorable, Judge of said Court:

The undersigned, administrator of the estate of said C— D—, de-

ceased, respectfully reports unto your Honor, that, in pursuance of the order of this court; made at the — term, 18—, in the above entitled cause, directing the sale of the real estate hereinafter described, he posted notices of the sale of said real estate in four of the most public places in — county, on the — day of —, 18—, and also caused a similar notice to be published four successive weeks prior to the day of sale hereinafter mentioned, in the *Kewanee Independent*, the nearest newspaper in this state, the first publication of which notice was on the — day of —, 18—, and the last on the — day of —, 18—, a copy of which notices, with the printer's certificate of publication thereof, marked "Exhibit A," is hereto annexed and made a part of this report. That on the — day of —, 18—, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon, at (here set forth the place of sale mentioned in the notices), being the time and place of sale specified in said notices, he offered the following described real estate for sale at public vendue to the highest bidder therefor, to wit: (here specify a tract of land or a lot, as described in the petition and order); and S— Y— having bid therefor the sum of — dollars, which was the highest bid for the same, the said tract of land (or lot) was struck off and sold to him for said sum. And thereupon the said S— Y— paid to the undersigned the sum of — dollars upon the purchase money of the said real estate, and executed and delivered to the undersigned a note, with O— P— for security, for — dollars, being the remainder of the purchase money of said real estate so purchased by him, and also executed and delivered to the undersigned a mortgage of said real estate to secure the payment of said note. (The report should show a strict compliance with the directions of the decree, whatever they may be.)

All of which is respectfully submitted.

A— B—, *Administrator*.

Date.

Form No. 82.

(§ 497.)

ORDER APPROVING THE REPORT OF SALE.

Title of court and cause as before.

And now, to wit: —, 18—, comes A— B—, the above named administrator, and files his report of the sale made by him of real estate, pursuant to an order of this court made at the — term, 18—; and it appearing to the court that the said administrator in making said sale has in

all respects complied with the directions of the statute and of said order: It is ordered by the court that the said report be approved (and that the said administrator execute and deliver to the purchaser of said real estate a deed conveying the same to the purchaser thereof).

Form No. 83.

(§§ 501, 502.)

DEED BY AN ADMINISTRATOR, UNDER AN ORDER OF COURT,

Know all men by these presents, that, whereas, A— B—, administrator of the estate of C— D—, deceased, appointed as such administrator by the county court of the county of—, in the state of Illinois, did, at the — term of said court, A. D. 18—, in a certain cause therein pending, entitled “A— B—, administrator of the estate of C— D—, deceased, Petitioner, vs. B— D—, A— D—, F— D— and O— R—, Defendants,” obtain an order of said court for the sale of the real estate hereinafter described, to satisfy the indebtedness of said C— B—, deceased, and the expenses of administration: And, whereas, at a sale by said administrator in pursuance of the directions of said order, made on the — day of —, 18—, the following described real estate situated in the county of —, and state of Illinois, to wit: (describe it), was struck off and sold by him to John Styles, of —, for the sum of — dollars (and if such is the fact, say, which sale was reported to and approved by said court at the — term thereof, 18—, and an order made directing the conveyance of the said tract of land to said John Styles).

Now, therefore, in consideration of the said sum of money, paid by the said John Styles, the said A— B—, as said administrator, does by these presents convey to the said John Styles all the claim and title of said C— D—, deceased, to and in the above described real estate. Dated this — day of —, 18—.

A— B—, *Administrator*. [SEAL]

Acknowledgment as in other cases.

NOTE —The title of the cause, the name of the court, and the date of the term of court at which the order was obtained must be referred to in the deed. Stat. 1872, Tit. Conveyances, § 12. A court of equity will compel an administrator to amend deeds made in these cases so as to set forth the above facts. *Thorp v. McCullum*, 1 Gilm. 614.

Form No. 84.

(Note to Form of Will No. 1, § 210; Stat. Tit. Dower, §§ 9, 10.)

RENUNCIATION BY A WIDOW OR SURVIVING HUSBAND OF
A TESTATOR, OF HER OR HIS CLAIM TO LEGACIES
AND BEQUESTS IN A WILL, (§ 532) AND RENUNCIATION
BY A WIDOW OF A JOINTURE IN HER FAVOR.

To the Honorable Judge of the County Court of — County:

I, A—— B——, widow (or surviving husband) of E—— B——, late of the county of ——, and state of ——, do hereby renounce and quit all claim to the benefit of* any legacy or devise, made to me by the last will and testament of said deceased husband (or wife) which has been exhibited and proved according to law (or otherwise, as the case may be),* and I do elect to take in lieu thereof, my dower or legal share of the estate of my said husband (or wife).

A—— B——.

Dated at, etc.

In case of a widow renouncing her jointure under the statute, Tit. Dower, § 9, insert between the asterisks the words, "of the jointure provided in my favor by (here describe the instrument and state the date, and the parties to it).

Form No. 85.

(§§ 534-537.)

ANNUAL SETTLEMENT.

STATE OF ILLINOIS, } ss.
— County.

To the Honorable Judge of the County Court of said County:

The undersigned, administrator of the estate of A— B—, deceased, respectfully submits to the court the following report of his acts and doings as such administrator, from his appointment to —, 18—.

DATE.	ITEMS OF RECEIPTS.	AMOUNT.	TOTAL AM'T.
1871.			Dolls. Cts.
July 1	Cash on hand at decease.		\$230 90
Oct. 1	Amount of appraisement bill		1,190 00
" 7	Amount of personal property taken by the widow at appraised value.....	\$550 00	
Nov. 20	Amount of sale bill.....	670 00	
		\$1,220 00	
	Excess of receipts for personal property over the amount of appraisement bill..		30 00
1872.			
Mar. 1	Collected S. Wright's note.....		53 00
	Collected John Day's account		138 00
	Total receipts.....		\$1,641 00
	<i>Items of Cash and Property Paid Out.</i>		
1871.			
July 1	To F. G. Welton, County Clerk, fees.....	\$7 50	
" 20	C. Bassett, for publishing notice to creditors	2 50	
Oct. 1	Appraiser's fees.....	6 00	
" 7	Amount of property taken by C— B—, widow of deceased, at ap- praised value.....	550 00	
	Amount paid widow—remainder of her award	275 00	
Nov. 10	H— R—, for digging grave	3 00	
	Gearhart & Crawford, for hearse and livery at funeral	25 00	
	H. C. Parker, for coffin	30 00	
1872.			
June 1	W. T. Cross, for monument	75 00	
	J. C. Smiley, physician's services in last sickness.....	15 00	
			989 00
	Amount in administrator's hands.....		\$652 00

All of which is respectfully submitted. G— C—, Administrator.

Form No. 86.

(§§ 534-5.)

**CLERK'S ENTRY OF AN ORDER TO NOTIFY THE HEIRS OF
THE DECEDENT OF THE FINAL SETTLEMENT BY THE
ADMINISTRATOR.**

IN THE MATTER OF NOTICE TO THE HEIRS OF A—— B——, DECEASED, OF
THE FINAL SETTLEMENT OF G—— C——, ADMINISTRATOR OF THE
ESTATE OF SAID A—— B——.

And now comes G—— C——, administrator of the estate of A—— B——, deceased, and represents to the court that he will be ready to make a final settlement of said estate, at the —— term of this court (or on a day in term time to be stated), and asks an order of the court directing what notice he shall give of such settlement to the heirs of said A—— B——; and upon consideration thereof, it is ordered that, on or before ——, 18——, he deliver, or cause to be delivered, to each of said heirs a written notice of the said settlement (or, that on or before, etc., he mail to each of them a written notice), informing them of the time and place of such settlement.

Form No. 87.

(§ 534.)

**NOTICE TO HEIRS OF THE TIME AND PLACE OF MAKING
FINAL SETTLEMENT AND PROOF OF SERVICE.**

STATE OF ILLINOIS, }
—— County. } *In the County Court.*

ESTATE OF A —— B ——, DECEASED.

To C —— B ——, widow and heir of said A —— B ——:

Take notice that the undersigned, administrator of the estate of A —— B ——, deceased, will at the June term of said county court (or according to the order), present his final settlement as such administrator to said court for approval, and pray an order for the distribution of the moneys remaining in his hands after payment of the debts of said estate and costs of administration (or according to the fact), when and where you may appear and object to said settlement if you see fit.

G —— C ——, Administrator.

Dated, etc.

STATE OF ILLINOIS, } ss.
 — County. }

G— C—, being duly sworn on his oath, says, that he delivered a copy of the foregoing notice to C— B— and E— B—, on the day of — 18—, and that he, on the same day, mailed a copy of said notice directed to E— B—, at —, the place of his residence.

G— C—.

Subscribed and sworn, etc.

Form No. 88.

(§§ 534, 537.)

FINAL SETTLEMENT

Title the same as in Form No. 85.

DATE.	ITEMS OF RECEIPTS.	AMOUNT.	TOTAL AM'T.
1872.	Amount on hand at last settlement.....		\$652 00
Sept. 2	Amount Seth White's note		203 50
	Amount interest received on sale notes.....		17 50
			\$873 00
	<i>Items of Cash Paid Out.</i>		
Sept. 10	To R. B. Foster, on judgment.....	\$175 00	
	F. G. Welton, Clerk, fees	8 25	
	Adm'rs commissions on \$1,862, 6 per cent.....	111 72	
			294 97
	Amount in administrator's hands.....		\$578 03
	RECAPITULATION.		
	Am't received at first annual settlement..	\$1,641 00	
	Am't received at this settlement.....	221 00	
	Total amount of receipts		\$1,862 00
	Am't paid out at first settlement.....	\$989 00	
	Am't paid out at this settlement.....	294 97	
			1,283 97
	Balance remaining in my hands.....		\$578 03

And the undersigned respectfully represents that all the assets of said estate have been collected, and all of the debts of said estate which were

filed in the office of the clerk of this court within two years after the date of his letters of administration, have been established and have been paid, and the last mentioned balance of \$578.03 remains in his hands for distribution among the heirs of said A— B—, as the court shall direct.

All of which is respectfully submitted.

G— C—, *Adm'r.*

Form No. 89

(§§ 534, 535, 549.)

CLERK'S ENTRY OF AN ORDER OF DISTRIBUTION.

IN THE MATTER OF THE FINAL SETTLEMENT OF G— C—, ADMINISTRATOR OF THE ESTATE OF A— B—, DECEASED, AND THE DISTRIBUTION OF THE MONEYS, (AND PROPERTY) REMAINING IN HIS HANDS, AMONG THE HEIRS.

And now comes G— C—, administrator of the estate of A— B—, deceased, and shows to the satisfaction of the court that he has given notice of his final settlement to all the heirs of said A— B—, as heretofore directed by this court, and presents his final settlement, showing that all of the assets of said estate have been collected, and all of the debts of said estate which were filed in the office of the clerk of this court within two years after the date of his letters of administration have been established, and have been paid by him, and that there remains in his hands, for distribution among the heirs of said A— B—, the sum of — dollars, and — cents; and upon examination thereof, the same appearing to be in all respects correct, and none of the heirs of the deceased appearing to object thereto, it is ordered by the court that said settlement be approved. And it having been made to appear to the court that C— B—, the widow, and E— B— and F— B—, the children of said A— B—, deceased, are his only heirs; it is further ordered that the said sum of money be distributed and paid to said widow and children, as follows: To said widow the sum of — dollars and — cents, and to each of said children the sum of — dollars and — cents, upon the giving to him by each of said distributees of a bond, with good security, to refund the due proportion of any debt which may thereafter appear against said estate, and the costs attending the recovery thereof, and that said administrator file such bonds in this court, and make report of his proceedings in this behalf.

Form No. 90.

(§§ 534, 549.)

CLERK'S ENTRY OF AN ORDER APPROVING OF PAYMENT
TO DISTRIBUTEES AND OF REFUNDING BONDS.IN THE MATTER OF THE DISTRIBUTION OF THE ESTATE OF A— B—,
DECEASED, AND HIS REPORT THEREOF.

And now comes G— C—, administrator of the estate of A— B—, deceased, and shows to the court here that, in compliance with the order of this court made at the — term thereof, 18—, he has distributed and paid to the heirs of said A— B—, the balance of the moneys of said estate remaining in his hands, and taken and filed with this court the several refunding bonds executed to him by said heirs; wherefore it is ordered by the court that his proceedings in that behalf be approved.

Form No. 91.

(§§ 538, 541.)

CLERK'S ENTRY OF AN ORDER OF COURT DIRECTING THE
APPORTIONMENT OF MONEYS AMONG THE CREDITORS
*PRO RATA.*IN THE MATTER OF THE SETTLEMENT OF G— C—, ADMINISTRATOR
OF THE ESTATE OF A— B—, DECEASED.

And now comes G— C—, administrator of the estate of A— B—, deceased, and files his settlement showing that the whole amount of moneys and assets which has come into his hands as such administrator, is — dollars, and that the whole amount of debts established against said estate is — dollars; and also showing that the debts of the first, second, third, fourth and fifth classes amount to — dollars, and those of the sixth class to — dollars, and that there is not sufficient money in his hands to pay but fifty per cent. of the amount of said debts of the sixth class. And the said settlement appearing to be in all respects correct: It is ordered by the court, that the same be approved, and that the administrator pay all the said debts of the first, second, third, fourth and fifth classes in full, and that he pay on each of said debts of the sixth class fifty per cent. of the amount thereof.

The settlement on which this order is founded is easily made up on the plan of Form No. 85, and will show, instead of the items of credits there stated; 1st. Money on hand at the decease. 2nd. The property taken by the widow on her award. 3d. All moneys received at the sale. 4th. Those collected on sale notes. 5th. Those collected on notes and accounts due the estate, and 6th. The total.

It will then show: 1st. All of the debts of each class established against the estate, and the total amount of each class. 2d. The total amount of so many of the preferred classes as are not equal to the amount of money and assets above mentioned. Then it will show the remainder, and what per cent. of the next class of debts entitled to payment.

Form No. 92.

(§ 544.)

CITATION TO AN ADMINISTRATOR TO MAKE SETTLEMENT.

STATE OF ILLINOIS, } ss.
 — County. }

The People of the State of Illinois, to G— C—:

You are hereby cited to appear before our county court, of the county of —, on the first day of the next term thereof, to be begun on the third Monday of —, 18—, then and there to make a settlement of the estate of A— B—, deceased, of which you are the administrator, or to show cause why the same is not done.

Witness, etc., (the usual attestation clause.)

Form No. 93.

(§ 544.)

CLERK'S ENTRY OF PROCEEDINGS ON A CITATION OF ADMINISTRATOR TO MAKE SETTLEMENT.

IN THE MATTER OF THE CITATION OF G— C—, ADMINISTRATOR OF THE ESTATE OF A— B—, DECEASED, TO MAKE SETTLEMENT.

And now comes G— C—, administrator of the estate of A— B—, deceased,* and presents his settlement to the court, and the same appear.

ing to be in all respects correct, it is ordered by the court that the same be approved. And the said G—— C——, having failed to show cause why the said settlement was not made: It is considered and adjudged by the court that he pay the costs of this proceeding.

Or, and now this matter coming on to be heard, and the said G—— C—— having failed to appear and make settlement of the said estate of A—— B——, as the administrator thereof, or to show cause why the same is not done; and it appearing to the court that citation to make such settlement or show cause as aforesaid on the first day of this term, has been duly served upon him more than ten days prior to the said first day of this term: It is ordered by the court that an attachment issue against him, the said G—— C——, returnable forthwith (or, on the first day of the next term of this court). (See Stat. title Administration, § 131; Gro. Stat., title Courts § 44.)

Form No. 94.

(§ 544.)

ATTACHMENT WRIT FOR CONTEMPT.

STATE OF ILLINOIS, } ss.
 — County. }

The People of the state of Illinois, to the sheriff of said county, GREETING:

We command you that you attach ——, so as to have his body before our county court within and for said county of ——, forthwith (or on the first day of the next term thereof), to answer unto us touching a certain contempt by him lately committed against us, as it is said, and further to do and receive what our said court shall in that behalf consider.

Hereof fail not, and have you then and there this writ.

Witness, ——, Clerk of our said court, and the seal thereof,
 [SEAL.] at ——, in said county, this —— day of ——, A. D. 18—.

—— —, Clerk.

Form No. 95.

(§ 544.)

CLERK'S ENTRY OF FINE FOR CONTEMPT.

THE PEOPLE OF THE STATE OF ILLINOIS, }
 ^{vs.}
 G—— C——. } *Attachment for Contempt.*

And now comes the said defendant, G—— C——, in the custody of the sheriff on an attachment against him for contempt, and this cause coming on to be heard, and the said G—— C—— having made and submitted to the court his answer under oath touching the contempt alleged against him in this cause, and the court having heard all the evidence submitted by the parties, and having fully considered the same, doth find that the said G—— C—— is guilty of contempt, in this, that he has failed and refused to make a settlement of the estate of A—— B——, deceased, whereof he was and is the administrator, appointed by this court, or to show cause why such settlement is not made, though heretofore cited so to do; and that he ought to pay a fine of twenty dollars (or, be imprisoned for the term of five days). It is therefore considered and adjudged by the court that the people of the state of Illinois have and recover of the said G—— C—— the said sum of twenty dollars, together with the costs of this proceeding (or, that he be imprisoned in the county jail for the said term of five days, and that he pay the costs of this proceeding).

Until the attachment is granted, the proceedings are entitled in the name of the civil proceeding, whatsoever that may be; but after the attachment has been granted, all of the proceedings must be in the name of the people. 9 Johns. 160; 5 Johns. 235, and cases cited.

Form No. 96.

(§ 545.)

**APPLICATION BY A PERSON ENTITLED UNDER AN ORDER
 OF THE COURT TO MONEYS OF THE ESTATE, FOR AN
 ATTACHMENT TO COMPEL THE ADMINISTRATOR TO PAY
 SUCH MONEYS.**

To the Honorable Judge of the County Court of — County:

The undersigned respectfully represents unto your honor, that he is a creditor of the estate of A—— B——, deceased, of which estate G——

C— is the administrator; that his claim was allowed by this court on the — day of —, 18—, against said estate, for the sum of — dollars, and that the same was classed by this court as of the fourth class. And he further says that, on the — day of —, 18—, such proceedings were had in this court, that an order was made directing said administrator to pay over to all of the creditors of said fourth class out of the moneys of said estate in his hands, the full amount of their respective claims allowed by this court: all of which appears of record in said court. And the undersigned further represents that on the — day of —, 18—, he demanded of said G— C— the payment of the aforesaid claim in his favor. Yet the said G— C—, notwithstanding more than thirty days have elapsed since the said demand was made, has not paid the same or any part thereof, but refuses so to do. Wherefore, the undersigned prays that this court will order an attachment against said G— C—, to the end that he may be compelled to pay the said claim.

Dated, etc.

W— S—.

Add a jurat.

Form No. 97.

(§ 545.)

CLERK'S ENTRY OF ORDER GRANTING AN ATTACHMENT
AGAINST A PERSONAL REPRESENTATIVE FOR FAILING
OR REFUSING TO PAY OVER MONEYS IN HIS HANDS AS
DIRECTED BY THE COURT.

IN THE MATTER OF THE APPLICATION OF W— S—, FOR AN AT-
TACHMENT AGAINST G— C—, ADMINISTRATOR OF THE ESTATE
OF A— B—, DECEASED.

Now comes W— S— and files his application under oath, for an attachment against G— C—, administrator of the estate of A— B—, deceased, for failing and refusing to pay over to him, for more than thirty days after demand made by him therefor, the amount due him and ordered by this court to be paid, in full out of the moneys of said estate in his hands, on a claim allowed by this court in his favor against said estate; and it appearing to the court that the said G— C—, administrator as aforesaid, has failed and refused to pay over said moneys to said W— S— within thirty days after demand made therefor: It is ordered by the court that an attachment issue to the sheriff of — county, against said G— C—, returnable forthwith.

the county court of said county for contempt, in disobeying the order of said court, made on the — day of —, 18—, directing him, the said G— C—, as administrator as aforesaid, to pay out of the moneys of said estate then in his hands, to F— B—, son and heir (or a creditor) of said A— B—, deceased, within thirty days after demand made therefor by the said F— B—, the sum of — dollars, due him, the said F— B—, upon his distributive share of said estate (or judgment rendered in his favor against said estate, as the fact may be), and such proceedings were had by and before said court in the premises, that said G— C— was convicted of failing and refusing to pay over said sum of money to said F— B—, for more than thirty days after demand made therefor by said F— B—, and was adjudged by said court guilty of contempt, and ordered to be committed to the jail of said county for the contempt aforesaid, to remain until he complies with said order, or until he is discharged by due course of law.

We therefore command you, the said sheriff, to take the said G— C— into your custody in the said jail, and him there safely keep until he shall pay over to said F— B— the moneys aforesaid, in compliance with said order, or until he is discharged by due course of law. Hereof fail not at your peril.

Add testatum clause as in other cases.

Form No. 100.

(§ 549.)

**BOND FROM A LEGATEE OR DISTRIBUTE TO AN EXECUTOR
OR ADMINISTRATOR, TO REFUND MONEY PAID TO HIM
AS LEGATEE OR DISTRIBUTE.**

Bond may be in the usual form, but running to the executor or administrator.

The condition of the above obligation is such, that, whereas the above bounden F— B— has this day been paid by said G— C—, executor of the last will of A— B—, deceased (or, administrator of the estate of A— B—, deceased), the sum of — dollars, being the amount of the legacy bequeathed by the last will of said A— B—, to him the said F— B— (or, the distributive share of the estate of said A— B—, due to the said F— B—, as heir at law of said A— B—): Now, therefore, if the above bounden F— B— shall refund his due

proportion of any debt which may hereafter appear against said estate, and the costs attending the recovery thereof, then this obligation to be void; otherwise to remain in full force and effect.

F—— B——. [SEAL]

T—— Y——. [SEAL]

Witness R—— R——.

Form No. 101.

(§ 551.)

**APPLICATION BY ADMINISTRATOR FOR THE COURT TO
APPORTION AMONG DISTRIBUTEES AMOUNT NECES-
SARY TO PAY A DEBT WHICH APPEARED AGAINST
THE ESTATE, AFTER DISTRIBUTIVE SHARES HAVE
BEEN PAID.**

To the Honorable Judge of the County Court of —— County.

The undersigned, administrator of the estate of A—— B——, deceased, respectfully represents, that, as such administrator, he, on the —— day of ——, 18——, paid to C—— B——, widow, and E—— B—— and F—— B——, children of A—— B——, deceased (the said widow and children being the only heirs and distributees of the estate of said A—— B——), the sum of two thousand dollars each, and took their respective bonds for the refunding of the due proportion of any debt which might thereafter appear against said estate, which said bonds, showing the amount so paid them respectively, are on file in this court. And the undersigned further represents that, afterwards there appeared against said estate a debt amounting to —— dollars due to one W—— S——, who caused the same to be allowed by this court, on the —— day of ——, 18——, and ordered to be paid in due course of administration; that the undersigned afterwards filed a settlement in this court showing that he had collected all the money and assets belonging to said estate, and showing that he had paid all other debts against said estate and the costs of settlement thereof, and that there remained in his hands the sum of —— dollars, which was applicable to the payment of said claim of W—— S——, and which sum has since been paid to said W—— S——. And the undersigned further says there is now due to said W—— S—— the sum of —— dollars, principal and interest thereon, amounting to —— dollars, and the costs of this proceeding he estimated at —— dollars, amounting in all to —— dollars, and that there is no money of the said estate in the hands of the undersigned, for the payment thereof. Wherefore he prays that an apportionment of said last

mentioned sum may be made by this court among said heirs, so that they may refund shares thereof in proportion to the amount received by them respectively as aforesaid.

G— C—, *Administrator.*

Date.

Form No. 102.

(§ 551.)

CLERK'S ENTRY OF AN ORDER APPORTIONING AMOUNT
TO BE REFUNDED BY DISTRIBUTEES FOR THE PAYMENT
OF DEBTS.

IN THE MATTER OF THE APPLICATION OF G— C—, ADMINISTRATOR
OF THE ESTATE OF A— B—, DECEASED, FOR AN APPORTION-
MENT OF THE AMOUNT OF MONEYS TO BE REFUNDED BY THE DIS-
TRIBUTEES OF SAID ESTATE FOR THE PAYMENT OF DEBTS.

And now comes G— C—, administrator of the estate of A— B—, and shows to the court that on the — day of —, 18—, he paid to C— B—, the widow, and E— B— and F— B—, the only children of A— B—, deceased (the said widow and children being the only heirs and distributees of the estate of said A— B—), the sum of — dollars each, and took their respective refunding bonds as provided by law, and that afterwards there appeared against said estate a debt amounting to — dollars, due to one W— S—, and that the same was allowed by this court on the — day of —, 18—, and ordered to be paid in due course of administration; that said G— C— afterwards made a settlement with this court, showing thereby that he had collected all of the moneys and assets belonging to said estate, and that he had paid all the debts, except the said debt owing to W— S—, and also the costs of settlement; that there then remained in his hands the sum of — dollars, which sum he has since paid to said W— S— upon said claim, and that there is now due to said W— S— the sum of — dollars, principal, and interest thereon, amounting to — dollars, and that the costs of this proceeding will be — dollars, amounting in all, to — dollars; and that said administrator has no moneys of said estate in his hands for the payment thereof, and prays an apportionment of said last mentioned sum by this court among said heirs and distributees according to the

amount received by them respectively as aforesaid. And the court being now fully advised in the premises, and being satisfied of the truth of said allegations: It is ordered by the court that the said C— B—, E— B— and F— B—, respectively, within sixty days from the date hereof, refund to said administrator, the sum of — dollars and interest thereon from this date, for the purpose of paying the sum remaining due as aforesaid to said W— S—; and it is further ordered by the court that said G— C— immediately make demand of the said distributees for the sum hereby ordered to be refunded by them.

Form No. 103.

(§ 553.)

CLERK'S ENTRY OF DECLARATION THAT THE ESTATE IS
INSOLVENT.

IN THE MATTER OF DECLARING THE ESTATE OF A— B—, DECEASED,
INSOLVENT.

And now, to wit, —, 18—, more than two years having elapsed since the grant by this court of administration upon the estate of A— B—, deceased, and it appearing to the court from the inventory, appraisement bill and the settlement heretofore made by G— C—, administrator of said estate, and records of this court, that the whole assets of said estate do not amount to sufficient to pay the debts and just demands against the same, together with the costs and expenses of settlement: It is therefore ordered by the court that said estate be declared insolvent.

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